



# **DRONE STRIKES: AN OVERVIEW, ARTICULATION AND ASSESSMENT OF THE UNITED STATES' POSITION UNDER INTERNATIONAL LAW**

**July 2019**

**Ryan Swan, JD**

**Center for Global Security Research**  
LAWRENCE LIVERMORE NATIONAL LABORATORY

# Drone Strikes: An Overview, Articulation and Assessment of the United States' Position Under International Law

Ryan Swan, JD†  
Center for Global Security Research

## INTRODUCTION

The United States unmanned aerial vehicle (UAV or drone) program has origins dating back to the early part of the twentieth century. From crude target tug vessels to sophisticated Hellfire missile delivery vehicles, United States drones have undergone a gradual metamorphosis from their early days as an obscure technology to their present status as a centerpiece in global counterterrorism operations. Since the attacks of September 11, 2001 and the onset of the war on terror, weaponized drones have effectuated thousands of strikes in numerous countries spanning multiple continents in the course of a claimed non-international armed conflict with “al-Qaida, the Taliban and their associated forces.”<sup>1</sup>

A plethora of scholarship has evaluated aspects of the legal underpinnings of the nearly two decade-long campaign and its utilization of weaponized drones. This article builds upon that analytic foundation to date in articulating and assessing the present United States legal position vis-à-vis its lethal drone strike operations under relevant principles of international law. It identifies numerous instances in which the United States position departs to varying degree from general international understanding and concludes that, in the aggregate, these deviations are sufficient to pose serious international rule of law concerns. It then goes further to briefly consider possible alternatives for mitigating these concerns, but notes their challenges given prevailing political circumstances.

The article is organized in four parts. Part I provides a condensed history of the development of drone capabilities in the United States and their use under the administrations of Clinton, Bush, Obama and Trump. Part II surveys principles of international law relevant to the analysis of United States drone strike operations abroad. Part III draws on key government documents to articulate the United States legal position, including its *jus ad bellum* justifications and stance on international humanitarian and international human rights law principles, and offers a legal assessment. Part IV briefly considers and evaluates possible alternatives to the present position.

---

† J.D., UCLA School of Law, 2018; M.Phil., International Relations, Trinity Hall, Cambridge, expected 2020. *The views and opinions of authors expressed herein do not necessarily state or reflect those of the United States government or Lawrence Livermore National Security, LLC.*

<sup>1</sup> Barack Obama, “The Future of our Fight Against Terrorism,” (Speech, Washington, D.C., May 23, 2013), National Defense University, <https://www.lawfareblog.com/text-presidents-speech-afternoon>

# PART I

## OVERVIEW OF UNITED STATES DRONE PROGRAM

### *Developmental History*

Perhaps the earliest employment of UAVs for military purposes dates back to 1849 with the Austrian army's use of incendiary balloon bombs in its suppression of the Republic of San Marco in Venice.<sup>2</sup> Development of crude UAV technology progressed over the next century with the advent of pilotless aircraft during the period of World War I. The United States initiated experimentation with such craft, developing early target drones.<sup>3</sup> In the course of World War II, these UAVs were primarily used as training tools for antiaircraft artillery testing and, to some extent, in aerial attack missions.<sup>4</sup> After the war, the sophistication of drone capabilities increased with the refining of television-facilitated, remote-controlled technology, which enabled craft, like the Ryan Firebee, to carry out reconnaissance missions during the Vietnam War.

In the early 1970s, John S. Foster, a physicist and fourth director of Lawrence Livermore National Laboratory, considered the possibility of equipping small, remotely-operated drones with ground-scanning cameras and, potentially, bombs. His musings led the Defense Advanced Research Projects Agency to construct two primitive seventy-five pound prototypes, Praeire and Calere, using lawn mower engines with limited flight times of two hours.<sup>5</sup> Further prototypes were developed over the subsequent decade, though more serious thought as to their actual operationalization would not come until 1982. On June 9 of that year, the Israeli Air Force (IAF), equipped with United States F-15 Eagle aircraft, launched Operation Mole Cricket 19 to disable Soviet-manufactured Syrian surface-to-air missile (SAM) systems and free Syrian air space for Israeli use in its invasion of Lebanon. Utilizing drones for decoy and real-time reconnaissance purposes, the IAF successfully incapacitated Syrian SAM networks, the first time United States-manufactured aircraft had decisively overcome such systems.<sup>6</sup>

---

<sup>2</sup> Kashyap Vyas, "A Brief History of Drones: The Remote Controlled Unmanned Aerial Vehicles," *Interesting Engineering*, January 2, 2018, <https://interestingengineering.com/a-brief-history-of-drones-the-remote-controlled-unmanned-aerial-vehicles-uavs>.

<sup>3</sup> Vyas, "A Brief History of Drones: The Remote Controlled Unmanned Aerial Vehicles."

<sup>4</sup> "The History of Drone Technology," RedOrbit.com, last modified May 4, 2018, <https://www.redorbit.com/reference/the-history-of-drone-technology/>

<sup>5</sup> Jack Doyle, "Father of the Drone," OZY (December 2013), <https://www.ozy.com/flashback/father-of-the-drone/4073>

<sup>6</sup> "35 Years Since Operation Mole Cricket 19: Lessons From One of the Most Critical Battles of the Cold War," *Military Watch*, accessed December 3, 2018, <https://militarywatchmagazine.com/article/35-years-since-operation-mole-cricket-lessons-from-one-of-the-most-critical-battles-of-the-cold-war>. The United States had specifically designed the F-15 Eagle to counter Soviet surface-to-air missile (SAM) systems and MiG-21 fighters (like the ones operated by the Syrian army), which it had failed to decisively counter during the course of the Vietnam War.

This demonstrated strategic utility of drones coincided with burgeoning terrorist threats in the Middle East.<sup>7</sup> While U-2 reconnaissance aircraft could provide some intelligence, drones could hover at lower altitudes over key points of interest. Leading Systems, Inc., was retained in a \$40 million “black” Pentagon project to further develop UAV capabilities.<sup>8</sup> By the end of 1986, it had developed the Gnat and Amber prototypes, but subsequently went bankrupt due to post-Cold War funding cuts. In 1991, the project was purchased and revitalized by a United States defense contractor, which engineered a silent motor for the Gnat. This led to development of what became the MQ-1 Predator.

### **Clinton Administration**

The incoming Clinton Administration faced issues of incomplete intelligence in its monitoring of escalating tensions in Yugoslavia. The Central Intelligence Agency (CIA) sought to bolster its capabilities, purchasing multiple Gnats deployed to its Gjader airfield in Albania. The Pentagon followed suit, deploying its drones to the Taszar base in Hungary.<sup>9</sup> Despite some of the shortcomings of the early Predator – its vulnerability to anti-aircraft defenses and some technical difficulties with its wings – it was successful in providing valuable intelligence through the 1990s and, ultimately, the 1999 North Atlantic Treaty Organization (NATO) Kosovo intervention.

All the while, threats of terrorism in the Middle East persisted during the 1990s. Throughout the previous decade, the CIA and Pakistani Inter-Services Intelligence Directorate had channeled considerable funds to Afghani mujahedeen in their struggle against Soviet occupation and the Soviet-backed regimes of Babrak Karmal and, subsequently, Mohammad Najibullah.<sup>10</sup> The provision of sophisticated anti-aircraft weaponry continued from 1985 to the eventual Soviet withdrawal in 1989.<sup>11</sup> Upon the fall of Najibullah’s government in 1992, the Peshawar Accords set up a coalitional government, comprised of representatives from seven different mujahedeen factions. However, this multi-partite power-sharing framework quickly unraveled into civil war. In 1994, the Taliban emerged from what is believed to have been a collection of Afghani nationals studying at religious institutions in Pakistan.<sup>12</sup> Shortly

---

<sup>7</sup> Chris Woods. “The Story of America’s Very First Drone Strike.” *The Atlantic*, May 2015. <https://www.theatlantic.com/international/archive/2015/05/america-first-drone-strike-afghanistan/394463/>. Roughly 300 United States and French peacekeepers were killed in Lebanon in terrorist attacks in 1983.

<sup>8</sup> Woods, “The Story of America’s Very First Drone Strike.”

<sup>9</sup> Woods, “The Story of America’s Very First Drone Strike.”

<sup>10</sup> Kenneth Katzman and Clayton Thomas, *Afghanistan: Post-Taliban Governance, Security, and U.S. Policy* (Washington, D.C.: Congressional Research Service, Library of Congress, 2017), 3, <https://crsreports.congress.gov/product/pdf/RL/RL30588/278>. The United States Department of States indicated that approximately \$3 billion in economic and covert military support was provided to the Afghani mujahedeen from 1980 to the Soviet withdrawal in 1989.

<sup>11</sup> Katzman and Thomas, *Afghanistan*, 2-3.

<sup>12</sup> “The Taliban,” Mapping Religious Organizations, Stanford University, accessed December 6, 2018, <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/367>

thereafter, it seized Kandahar City and, in 1996, Kabul. It established the Islamic Emirate of Afghanistan in September 1996 under Mohammad Umar.

The Clinton Administration refused to recognize the Taliban as the legitimate government of Afghanistan and demanded closure of the Afghani embassy in Washington, D.C., in 1997. Of mounting concern was the regime's relationship with al-Qaida, an organization founded by Saudi national, Osama bin Laden, in connection with the Egyptian Islamic Jihad in late 1988.<sup>13</sup> The group adopted an adversarial position toward United States interference in the Middle East and had orchestrated the bombing of the Gold Mohur Hotel in Aden, Yemen in December 1992. This and other potential threats posed by al-Qaida did not go unwatched in the United States<sup>14</sup> and raised the stakes in Afghanistan, where bin Laden relocated from Sudan in May 1996. These worries became even more acute after the August 7, 1998 bombings of United States embassies in Nairobi, Kenya and Dares Salaam, Tanzania. Sanctions were promptly imposed on the Taliban government and cruise missiles were fired at suspected al-Qaida training camps in eastern Afghanistan and Sudan.<sup>15</sup>

The CIA and the newly-created National Coordinator for Security, Infrastructure Protection and Counterterrorism (NCSIPC) zeroed in on al-Qaida and possible means of countering it. One measure considered was drone surveillance, which President Clinton authorized to gather intelligence on jihadist training grounds in rural Afghanistan.<sup>16</sup> The missions performed unexpectedly well, even yielding imagery of a figure appearing to be bin Laden himself.<sup>17</sup> NCSIPC director, Richard Clarke, was the first to suggest the prospect of actually arming the Predator to eliminate the alleged target, though this met with initial pushback from both Air Force and CIA circles – the former concerned that the United States was not at war with Afghanistan and the latter concerned that, as an intelligence agency, it should not be engaging in military-like actions.<sup>18</sup>

Other possibilities, including investiture in regional proxy organizations, capture missions and assassination schemes involving air-launched Tomahawk cruise missiles, were bandied about, but faltered due to the inability of the intelligence community to pinpoint bin Laden's precise location for a period sufficiently lengthy to carry out missile strikes, in addition to reservations

---

<sup>13</sup> "Mapping Militant Organizations: Al Qaeda," *Stanford University*, accessed on December 10, 2018, <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/21?highlight=al+qaeda>

<sup>14</sup> Department of State, *1996 Patterns of Global Terrorism Report* (Washington, D.C.: 1997), <https://1997-2001.state.gov/global/terrorism/1996Report/1996index.html#intro>; Department of State, *Patterns of Global Terrorism: 1997* (Washington, D.C.: 1998), <https://1997-2001.state.gov/global/terrorism/1997Report/1997index.html>

<sup>15</sup> Jamie McIntyre, "U.S. Missiles Pound Targets in Afghanistan, Sudan," *CNN*, August 20, 1998, <http://www.cnn.com/US/9808/20/us.strikes.01/>

<sup>16</sup> Kaplan, Fred. "The First Drone Strike." *Slate*, September 2016. [http://www.slate.com/articles/news\\_and\\_politics/the\\_next\\_20/2016/09/a\\_history\\_of\\_the\\_armed\\_drone.html](http://www.slate.com/articles/news_and_politics/the_next_20/2016/09/a_history_of_the_armed_drone.html)

<sup>17</sup> Warren Bass, "How the U.S. Stumbled into the Drone Era," *The Wall Street Journal*, July 24, 2014. <https://www.wsj.com/articles/how-the-u-s-stumbled-into-the-drone-era-1406234812>

<sup>18</sup> Kaplan, "The First Drone Strike."

surrounding the potential impact on civilian populations.<sup>19</sup> Counterterrorism deliberations intensified further when al-Qaida operatives carried out a further bombing, this time on the USS Cole in Yemen's Aden Harbor on October 12, 2000. Shortly thereafter, in President Clinton's final month in office, high level officials largely reached consensus on the desirability of arming drones, reasoning that if air-launched Tomahawk missile strikes were justifiable, then surely smaller Hellfire missile strikes launched from Predator drones would be as well.<sup>20</sup> Thus, the Predator was subsequently modified to carry a laser-seeker and an air-to-ground Hellfire missile.

### ***Bush Administration***

Five days into President Bush's first term, Clarke sent a memorandum to the incoming National Security Advisor, Condoleezza Rice, stating that al-Qaida "is not some narrow, little terrorist issue," but rather "affects centrally [United States'] policies on Pakistan, Afghanistan, Central Asia, North Africa and the GCC [Gulf Coast Countries]."<sup>21</sup> Though the new administration did not respond to the admonition with the greatest urgency, it did push forward with the testing of the armed Predator and scheduled deployment for late in the year 2001.<sup>22</sup> It would be the attacks of September 11, however, that would usher in the dawn of the weaponized drone era.

The attacks were immediately attributed to al-Qaida operatives and a five-point ultimatum was presented to Umar's government demanding the extradition of all al-Qaida leaders and full access to suspected terrorist training camps.<sup>23</sup> Initially Taliban leaders declined, citing a request for evidence of bin Laden's involvement in the attacks, but did ultimately offer to acquiesce. The United States rejected this offer and, instead, launched Operation Enduring Freedom on October 7, 2001.<sup>24</sup> The Taliban regime was expeditiously toppled, though large numbers of its members evaded capture, seeking refuge in rural regions of Afghanistan and Pakistan.

As part of the campaign pursuant to the Authorization for Use of Military Force (AUMF) passed by Congress on September 14, the armed Predator, which was still undergoing evaluation and testing at the time, was promptly called into service and deployed. Within two months of the attacks, it is estimated that CIA-operated drones fired approximately forty Hellfire missiles throughout Afghanistan, allegedly killing bin Laden's son-in-law, Mohammad Atef.<sup>25</sup> Though precise data on drone strikes in Afghanistan from this early period is elusive, the program was expanded in 2004 to include al-Qaida operatives in Pakistan, where from 2004 through 2008, at

---

<sup>19</sup> Bass, "How U.S. Stumbled into the Drone Era."

<sup>20</sup> Kaplan, "The First Drone Strike."

<sup>21</sup> National Security Council, "Memorandum for Condoleezza Rice: Presidential Policy/initiative Review—AlQida Network" (Washington, D.C.: The White House, January 25, 2001), <https://nsarchive2.gwu.edu//NSAE/BB/NSAE/BB147/index.htm>

<sup>22</sup> Kaplan, "The First Drone Strike."

<sup>23</sup> "The U.S. Refuses to Negotiate with the Taliban," British Broadcasting Company, accessed on December 10, 2018, [http://www.bbc.co.uk/history/events/the\\_us\\_refuses\\_to\\_negotiate\\_with\\_the\\_taliban](http://www.bbc.co.uk/history/events/the_us_refuses_to_negotiate_with_the_taliban)

<sup>24</sup> Kathy Gannon, "Bush Rejects Taliban Bin Laden Offer," *Washington Post*, October 14, 2001.

<sup>25</sup> Woods, "The Story of America's Very First Drone Strike"; Kaplan, "The First Drone Strike."

least forty-nine strikes were conducted killing at least 404, including, at least 167 civilians.<sup>26</sup> It is also possible that a small number of drone strikes might have been conducted in Somalia as well in 2007.<sup>27</sup> It is unclear what role drones played in Operation Iraqi Freedom in 2003 and its aftermath, though, incidentally, the technology featured in as a plank in the flawed pretense for the invasion, which suggested Iraq had a UAV fleet capable of delivering biological and chemical weapons.<sup>28</sup>

More translucent than the opaque data on drone operations under President Bush is his Administration's enhanced interrogation policy. After September 11, the decision was quickly taken to classify the attacks as acts of war, instead of acts of international crime. On the endorsement of John Yoo,<sup>29</sup> captured suspects were to be deemed detainees as opposed to prisoners of war, thereby avoiding the applicability of Geneva Convention protections for the latter. On September 17, 2001, President Bush authorized the CIA to commence with the employment of enhanced interrogation techniques.<sup>30</sup> The "Torture Memos"<sup>31</sup> of Yoo and Assistant Attorney General, Jay Bybee, followed, presenting a maximally narrow definition of torture, arguing against the constitutionality of the application of the United Nations Convention Against Torture (CAT) to the president in restricting his ability to wage a war against terrorism and providing justifications for the interrogation practices.<sup>32</sup>

The CIA, the Defense Intelligence Agency and factions of the military proceeded to carry out a variety of tactics on detainees at such locations as Guantanamo Bay in Cuba, Abu Ghraib in Iraq and various black sites around the world. Shortly after the invasion of Iraq, Amnesty International released reports in June 2003 of grave human rights abuses perpetrated by United States personnel at Abu Ghraib, leading to mass media coverage and unleashing what became the Abu Ghraib prisoner abuse scandal.<sup>33</sup> This, along with the leak of one of the Torture Memos in June 2004 and the CIA's destruction of damning video tapes in 2005, led to widespread popular condemnation. In December 2014, the Senate Intelligence Committee released an executive summary of a six thousand-page report "highly critical" of the CIA's

---

<sup>26</sup> "Drone Strikes in Pakistan," The Bureau of Investigative Journalism, accessed October 29, 2018, <https://www.thebureauinvestigates.com/projects/drone-war/pakistan>

<sup>27</sup> "Drone Strikes in Somalia," The Bureau of Investigative Journalism, accessed December 12, 2018, <https://www.thebureauinvestigates.com/projects/drone-war/somalia>

<sup>28</sup> Spencer Ackerman, "The CIA Actually Thought Saddam Had Drones Full of Bioweapons," *Wired*, March 19, 2013, <https://www.wired.com/2013/03/drone-bioweapons/>

<sup>29</sup> John Yoo served in the Office of Legal Counsel of the Department of Justice from 2001 to 2003.

<sup>30</sup> Tessa Berenson, "A Timeline of the Interrogation Program," *Time*, December 9, 2014, <http://time.com/3625181/senate-torture-report-timeline/>

<sup>31</sup> The "Torture Memos" refer to three documents stemming from the Office of Legal Counsel within the Department of Justice in August 2002—"Standards of Conduct for Interrogation Under 18 U.S.C. Sections 2340-2340A" drafted by Bybee, "Interrogation of Al Qaeda" drafted by Bybee and an untitled letter drafted by John Yoo to Attorney General Alberto Gonzales.

<sup>32</sup> Jay Bybee, "Standards of Conduct for Interrogation Under 18 U.S.C. Sections 2340-2340A" (Washington, D.C.: Office of Legal Counsel, United States Department of State, August 1, 2002), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf>

<sup>33</sup> "Iraq: Human Rights Must Be Foundation For Rebuilding," Amnesty International Press Release, MDE 14/136/2003, June 20, 2003, <https://www.amnesty.org/download/Documents/108000/mde141362003en.pdf>

treatment of detainees between 2001 and 2009.<sup>34</sup> Today enhanced interrogation practices of the CIA and Armed Forces in Afghanistan between 2003 and 2004 is under consideration for possible action by the International Criminal Court.<sup>35</sup>

A May 2004 report on detention and interrogation activities by CIA Inspector General, John Helgerson, indicates that the CIA was already considering the legal infirmities of its detention program in 2003.<sup>36</sup> It raised concerns surrounding potential criminal liability for CIA officers employing interrogative tactics, like waterboarding, sleep deprivation and exploitation of detainee phobias, under CAT. The number of detainees during this period was also considerable. The Department of State's Pattern's of Global Terrorism report for 2002 notes that the Pakistani government had detained and transferred custody to United States of some five hundred suspected al-Qaida and Taliban affiliates and CIA Director, George Tenet, stated in December 2002 that more than three thousand al-Qaida personnel had already been detained.<sup>37</sup> Investigative reporting by Mark Mazzetti of the New York Times suggests that, in light of the legal issues surrounding the detention program and the scale of the detainee population, a largely internal decision was taken by the CIA to transition from capturing to killing suspected terrorists.<sup>38</sup> The CIA's drone program, separate and distinct from that of the Department of Defense, became the vehicle for the clandestine targeted killing campaign.

### **Obama Administration**

Eager to distance himself from the ignominy of the Bush Administration's detention policies, Barack Obama vowed to end the program as a presidential candidate. Following his election, he called for a "new approach [to countering terrorism] – one that reject[s] torture and one that recognize[s] the imperative of closing the prison at Guantanamo Bay."<sup>39</sup> While phasing out torture, available data elucidates that this "new approach" was in part just an embrace of the

---

<sup>34</sup> "Committee Study of the Central Intelligence Agency's Detention and Interrogation Program" (Senate Select Committee on Intelligence, December 9, 2014), <https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srt288.pdf>

<sup>35</sup> "The Prosecutor of the International Criminal Court, Fatou Bensouda, Requests Judicial Authorization to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan" (Office of the Prosecutor, International Criminal Court, November 20, 2017) <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh>. The investigation includes review of "war crimes by members of the United States ("US") armed forces on the territory of Afghanistan, and by members of the US Central Intelligence Agency ("CIA") in secret detention facilities in Afghanistan and on the territory of other States Parties to the Rome Statute, principally in the period of 2003-2004."

<sup>36</sup> "Counterterrorism, Detention and Interrogation Activities from September 2001 to October 2003," 2003-7123-IG (Central Intelligence Agency, May 7, 2004), <https://www.cia.gov/library/readingroom/document/5856717>

<sup>37</sup> Micah Zenko, "Why Did the CIA Stop Torturing and Start Killing," *Council on Foreign Relations* (blog), April 7, 2013, <https://www.cfr.org/blog/why-did-cia-stop-torturing-and-start-killing>

<sup>38</sup> Mark Mazzetti, "Rise of the Predators: A Secret Deal on Drones, Sealed in Blood," *The New York Times*, April 6, 2013, <https://www.nytimes.com/2013/04/07/world/asia/origins-of-cias-not-so-secret-drone-war-in-pakistan.html?pagewanted=print>

<sup>39</sup> Barack Obama, "Speech on National Security" (speech, May 21, 2009), *The New York Times*, <https://www.nytimes.com/2009/05/21/us/politics/21obama.text.html>

CIA's kill-in-lieu-of-capture preference dating back to the Helgerson Memo of President Bush's first term.

President Obama's first year in office saw a dramatic increase in the number of authorized drone strikes with Pakistan becoming the hub of these operations during his first term. The fifty-four known strikes he authorized in Pakistan in 2009 alone exceeded the forty-nine during his predecessor's entire tenure as president.<sup>40</sup> The Bureau of Investigative Journalism reports that from 2009 through 2015 at least 372 drone strikes were carried out in Pakistan resulting in at least 2,084 total casualties, of which at least 246 were civilians.<sup>41</sup> In the years 2009 and 2010, three air strikes were also conducted in Yemen, though these figures sharply increased in 2011, when al-Qaida forces allegedly infiltrated Yemeni protests affiliated with the broader Arab Spring uprisings. From 2011 through 2015, at least 114 air strikes were authorized in Yemen, killing 537 people and at least seventy-seven civilians.<sup>42</sup> The campaign in Somalia against al-Shabaab, commenced by President Bush in 2007, was continued and expanded under President Obama, with at least nineteen authorized air strikes from 2009 through 2015 leading to at least forty casualties.<sup>43</sup> He also authorized the CIA to provide assistance to Arab Spring-related rebel groups opposing the government of Bashar al-Assad in Syria. In summer 2014, airstrikes in Syria were commenced against Islamic State of Iraq and the Levant (ISIL) operatives, which led to a reported 13,501 strikes in Syria and Iraq from August 2014 through the end of Obama's presidency (the number of drone strikes is not available).<sup>44</sup>

The administration's embrace of targeted drone strikes as a centerpiece of its counterterrorism operations was not undertaken, however, without some consideration of legal constraints. President Obama himself noted a reservation that drones might become a "cure-all for terrorism," particularly in non-active war zone regions.<sup>45</sup> In May 2013, the White House released the Presidential Policy Guidance on Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (PPG) fact sheet. It stated a preference for capture and set forth criteria for the use of lethal force, namely, a legal basis for the use of force, a "continuing, imminent threat" posed by prospective targets, a checkbox list, including "near certainty" of any target's presence and minimal risk to non-combatants, and compliance with international laws of armed conflict and state

---

<sup>40</sup> Jessica Purkiss and Jack Serle, "Obama's Covert Drone War in Numbers: Ten Times More Strikes Than Bush," *The Bureau of Investigative Journalism*, January 17, 2017, <https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush>

<sup>41</sup> "Drone Strikes in Pakistan," *The Bureau of Investigative Journalism*, accessed January 2, 2019, <https://www.thebureauinvestigates.com/projects/drone-war/pakistan>

<sup>42</sup> "Drone Strikes in Yemen," *The Bureau of Investigative Journalism*, accessed January 2, 2019, <https://www.thebureauinvestigates.com/projects/drone-war/yemen>

<sup>43</sup> "Drone Strikes in Somalia," Bureau of Investigative Journalism, accessed January 2, 2019, <https://www.thebureauinvestigates.com/projects/drone-war/somalia>

<sup>44</sup> Purkiss and Serle, "Obama's Covert Drone War in Numbers: Ten Times More Strikes Than Bush."

<sup>45</sup> Daniel J. Rosenthal and Loren DeJonge Schulman, "Trump's Secret War on Terror," *The Atlantic*, August 10, 2018, <https://www.theatlantic.com/international/archive/2018/08/trump-war-terror-drones/567218/>

sovereignty.<sup>46</sup> The administration also issued Executive Order 13732 in July 2016 which affirmed the United States' commitment to respect the laws of armed conflict and called for the release of an annual report on "the number of strikes undertaken by the U.S. Government against terrorist targets outside areas of active hostilities" and "assessments of combatant and non-combatant deaths resulting from those strikes."<sup>47</sup>

### **Trump Administration**

At the time of this writing, President Trump seems to have embraced his predecessor's operational expansion of the drone program but rejected his key bureaucratic constraints and protections. Pivotaly, he appears to have waived the Obama-era requirement for White House authorization of lethal strikes, endowing generals and lower-level commanders with wide latitude in ordering strikes, and foundationally lowered the strike threshold, cutting Obama's PPG requirement of a "continuing, imminent threat." Additionally, he appears to have removed from the checkbox list the requirement of "near certainty" that the target be in the strike vicinity.<sup>48</sup> Unlike President Obama, who made an overt effort to legitimize drone operations through greater public transparency, President Trump has actively undermined this initiative, revoking Executive Order 13732's reporting requirement<sup>49</sup> and vigorously withholding even general information concerning his new drone guidelines and overall strategy.

Despite all the secrecy, available data readily supports the proposition that the Trump Administration has reinvigorated targeted strike operations. In the president's first year, the number of strikes in Yemen shot up to 127, compared with the thirty-seven of President Obama's final year.<sup>50</sup> In Somalia, 2017 saw at least thirty-five confirmed strikes against al-Shabaab, compared with the fourteen of the year prior.<sup>51</sup> These spikes and the intensification of air operations are not surprising in light of the administration's March 2017 exemption of swaths of both countries from Obama-era targeting guidelines by simply declaring them areas of active hostilities.<sup>52</sup> The number of strikes in Afghanistan also more than doubled from 1,071

---

<sup>46</sup> "U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities," Office of the Press Secretary, May 23, 2013, <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>

<sup>47</sup> "United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force," Executive Order 13732, 81 FR 44485, July 7, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/07/01/executive-order-united-states-policy-pre-and-post-strike-measures>

<sup>48</sup> Katie Bo Williams, "How Many Civilians Die in Covert US Drone Strikes? It Just Got Harder to Say," *Defense One*, March 6, 2019, [https://www.defenseone.com/news/2019/03/how-many-civilians-die-covert-drone-strikes-it-just-got-harder-to-say/155355/?oref=d\\_brief\\_nl](https://www.defenseone.com/news/2019/03/how-many-civilians-die-covert-drone-strikes-it-just-got-harder-to-say/155355/?oref=d_brief_nl)

<sup>49</sup> Matthew Kahn, "Document: Trump Revokes Obama Executive Order on Counterterrorism Strike Casualty Reporting," *Lawfare*, March 6, 2019, <https://www.lawfareblog.com/document-trump-revokes-obama-executive-order-counterterrorism-strike-casualty-reporting>

<sup>50</sup> "Drone Strikes in Yemen."

<sup>51</sup> "Drone Strikes in Somalia."

<sup>52</sup> Jessica Purkiss, Jack Serle and Abigail Fielding-Smith, "US Counter Terror Air Strikes Double in Trump's First Year," *The Bureau of Investigative Journalism*, December 19, 2017, <https://www.thebureauinvestigates.com/stories/2017-12-19/counterterrorism-strikes-double-trump-first-year>

in 2016 to 2,609 in 2017.<sup>53</sup> In early 2018, the president made overtures about Pakistan, suggesting in a Tweet that they “give safe haven to the terrorists we hunt in Afghanistan, with little help. No more!” Though a trend of declining airstrikes in Pakistan was reversed in 2017, 2018 saw only one confirmed strike. Additionally, the CIA is expanding drone operations to northeastern Niger in furtherance of potentially instituting strikes against suspected Islamic militants in Libya.<sup>54</sup>

As of presently, the Trump Administration’s drone policy is largely unclear. The downward delegation of ultimate decisional authority has increasingly displaced responsibility from politically accountable administration leaders. Prevailing strictures of secrecy adopted by the administration have undermined congressional oversight, limiting public hearings and discussions. The lack of clear guidelines would also seem to eschew verifiability of compliance with relevant international laws. This may well suggest to the international community that the United States’ strike operations fall outside the scope of accepted norms and constitute an act of United States exceptionalism.

### **Summary**

The evolution of UAV technologies in the United States predates World War II, though, it was the 1970s and 1980s that saw the conception and realization of the drone in its early modern form. Drone development was revitalized in the wake of the first Gulf War and the successful use of precision-guided munitions. Under the Clinton Administration, both the CIA and Pentagon began operationalizing modern drone capabilities for reconnaissance purposes, first in Europe and then in the Middle East amid rising concerns about al-Qaida operations in Taliban-controlled Afghanistan. The practice became more acute in rural Afghanistan following the al-Qaida-attributed bombings of United States’ embassies in Kenya and Tanzania in 1998, where the performance of drone surveillance exceeded expectations. NCSPIC director, Richard Clarke, suggested arming drones to eliminate key targets identified in the field, though this initially met with reluctance from both CIA and Pentagon circles. However, consensus to move forward was finally reached in the last weeks of the Clinton presidency.

Weaponized drones appear to have been operationalized in the immediate aftermath of the September 11 attacks and the congressional AUMF of September 2001. Under the Bush Administration, the use of targeted drone strikes was largely classified, though it is documented that operations were expanded to Pakistan in 2004, where at least forty-nine strikes were conducted by 2009. President Obama embraced and expanded targeted drone strike operations in Afghanistan, Pakistan, Yemen and Somalia and introduced them in Syria, while also attempting to develop policy guidelines for enhanced transparency and accountability.

---

<sup>53</sup> “Drone Strikes in Afghanistan,” *The Bureau of Investigative Journalism*, accessed on January 2, 2019, <https://www.thebureauinvestigates.com/projects/drone-war/afghanistan>

<sup>54</sup> Joe Penny, Eric Schmitt, Rukmini Callimachi and Christoph Koettl, “C.I.A. Drone Mission, Curtailed by Obama, Is Expanded in Africa Under Trump,” *The New York Times*, September 9, 2018, <https://www.nytimes.com/2018/09/09/world/africa/cia-drones-africa-military.html>

President Trump has embraced his predecessor's expansion of drone operations, while apparently reverting back to Bush-era secrecy and relaxing Obama-era legal and procedural guidelines. As of the time of this writing, the parameters of the Trump Administration's drone policy remain largely unknown and susceptible to serious legal critique.

## ***Drone Program Details***

### **Relevant Actors**

Both the United States military and the CIA carry out drone strikes around the world. Cooperation between the CIA and the military's Joint Special Operations Command<sup>55</sup> (JSOC) has been extensive, though in the case of drone strike operations, frequency, scope and applicable protocols and engagement directives are largely unclear.<sup>56</sup> Still, there is reason to believe that military-CIA synergy in the drone sphere has been considerable. In September 2011, the Washington Post reported that "co-mingling [of the organizations] at remote bases is so complete that US officials ranging from congressional staffers to high-ranking CIA officers said they often find it difficult to distinguish agency from military personnel."<sup>57</sup> It has also noted that the two organizations may have carried out operations pursuant to one another's legal authority, alleging CIA Director, General Mike Hayden, communicated with Central Command commander, General Martin Dempsey, "to sort out which activities should be done by the military under Title 10 and which should be CIA Title 50 'covert' activities."<sup>58</sup> In testifying before a 2011 hearing of the Emerging Threats and Capabilities Subcommittee of the House Committee on Armed Services, acting Assistant Secretary of Defense for Special Operations and Low Intensity Conflict, Michael Lumpkin, stated "[w]hichever organization [CIA or JSOC] has primary authority to conduct the operations leads; whichever organization has the superior

---

<sup>55</sup> The JSOC was established by a classified charter in 1980 to carry out special operations and reporting directly to the Joint Chiefs of Staff to permit more expeditious decision-making. It was later moved under the Special Operations Command (SOCOM), which, in 2003, then-Secretary of Defense, Donald Rumsfeld, converted into a "supported command" to allow it to plan and execute its own missions. Under President Bush, the Administration bypassed SOCOM altogether, issuing orders directly to JSOC. More recently, while CIA drone strikes have attracted more generally attention due to governmental leaks and concern over the Agency's involvement in combat-like operations, JSOC drone activities have, according to some, been far more expansive. See "The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions," Columbia Law School Human Rights Clinic and Center for Civilians in Conflict, 2012, 11, <https://www.law.columbia.edu/human-rights-institute/counterterrorism/drone-strikes/civilian-impact-drone-strikes-unexamined-costs-unanswered-questions>; News Briefing, Department of Defense, January 7, 2003, <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=1226>; Gretchen Gavett, "What is the Secretive US 'Kill/Capture' Campaign," *PBS*, June 17, 2011.

<sup>56</sup> "The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions," 11.

<sup>57</sup> Greg Miller and Julie Tate, "CIA Shifts Focus to Killing Targets," *The Washington Post*, September 1, 2011, [https://www.washingtonpost.com/world/national-security/cia-shifts-focus-to-killing-targets/2011/08/30/gIQA7MZGvl\\_story.html?utm\\_term=.479139a5daed](https://www.washingtonpost.com/world/national-security/cia-shifts-focus-to-killing-targets/2011/08/30/gIQA7MZGvl_story.html?utm_term=.479139a5daed)

<sup>58</sup> David Ignatius, "Rewriting Rumsfeld's Rules," *The Washington Post*, June 3, 2011, [https://www.washingtonpost.com/opinions/rewriting-rumsfelds-rules/2011/06/02/AGHIXPIH\\_story.html?utm\\_term=.004ec9f73f58](https://www.washingtonpost.com/opinions/rewriting-rumsfelds-rules/2011/06/02/AGHIXPIH_story.html?utm_term=.004ec9f73f58)

planning and expertise plans it; both organizations share information about intelligence, plans and ongoing operations fully and completely.”<sup>59</sup>

In Pakistan, the CIA has appeared to bear primary responsibility for drone strike operations, allegedly with consent of the Pakistani government. A 2009 report of *The Nation* suggests, however, that Blackwater operatives under JSOC auspices have participated in parallel operations to those of the CIA.<sup>60</sup> Some reports have maintained that JSOC has itself conducted a limited number of strikes,<sup>61</sup> while others contend its role has been limited to assisting with the provision of intelligence for CIA-led strikes.<sup>62</sup> The United States officially maintains the position that special forces present in Pakistan are there simply to facilitate the training of Pakistani forces.<sup>63</sup>

In Yemen, both the CIA and JSOC have conducted drone strikes since 2011 and intensified in 2012. The Obama Administration described the CIA and JSOC missions in Yemen as “closely coordinated,”<sup>64</sup> though some accounts suggest that drone strike operations there are primarily under JSOC control with CIA assistance.<sup>65</sup> Marc Ambinder and D.B. Grady suggest CIA and JSOC cooperation in Yemen as “almost seamless” with “JSOC and the CIA alternating Predator missions and borrowing each other’s resources, such as satellite bandwidth.”<sup>66</sup>

Drones appear to have begun being used to track individuals in Somalia in 2007 under President Bush. Thereafter, they carried out reconnaissance missions until June 2011, when strikes against alleged members of al-Shabaab were ordered under President Obama.<sup>67</sup> According to CNN, the strikes were “part of a new secret joint Pentagon and CIA war” against Somali al-Shabaab militants.<sup>68</sup> Though drone strikes in Somalia appear to have been escalating, conventional air and helicopter raids carried out by JSOC from CIA, Air Force and security

---

<sup>59</sup> “The Future of US Special Operations Force: Ten Years After 9/11 and Twenty-Five Years After Goldwater-Nichols,” statement of Michael Lumpkin, Acting Assistant Secretary of State for Special Operations and Low Intensity Conflict, before Hearing of the Emerging Threats and Capabilities Subcommittee of the House Committee on Armed Services, 112<sup>th</sup> Congress, First Session, September 22, 2011, <https://www.govinfo.gov/content/pkg/CHRG-112hhrg70785/html/CHRG-112hhrg70785.htm>

<sup>60</sup> Jeremy Scahill, “The Secret US War in Pakistan,” *The Nation*, November 23, 2009, <https://www.thenation.com/article/secret-us-war-pakistan/>

<sup>61</sup> Dana Priest and William M. Arkin, *Top Secret America* (New York: Little, Brown & Company, 2011)

<sup>62</sup> “The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions,” 15.

<sup>63</sup> “News Brief with Geoff Morrell From the Pentagon,” Department of Defense, November 24, 2009.

<sup>64</sup> Adam Entous, Siobhan Gorman and Julian E. Barnes, “U.S. Relaxes Drone Rules: Obama Gives CIA, Military Greater Leeway in Use Against Militants in Yemen,” *The Wall Street Journal*, April 26, 2012, <https://www.wsj.com/artiles/SB10001424052702304577366251852418174>

<sup>65</sup> Mark Mazzetti, “C.I.A. Building Base for Strikes in Yemen,” *The New York Times*, June 14, 2011, <https://www.nytimes.com/2011/06/15/world/middleeast/15yemen.html>

<sup>66</sup> “The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions,” 13, citing Marc Ambinder and D.G. Grady, *The Command: Deep Inside the President’s Secret Army* (Hoboken: John Wiley & Sons, 2012).

<sup>67</sup> Mark Mazzetti and Eric Schmitt, “U.S. Expands Its Drone War into Somalia,” *The New York Times*, July 1, 2011, <https://www.nytimes.com/2011/07/02/world/africa/02somalia.html>

<sup>68</sup> Barbara Starr, “U.S. Strikes al Qaeda Affiliate in Somalia,” *CNN*, June 28, 2011, [security.blogs.cnn.com/2011/06/28/u-s-strikes-al-qaeda-affiliate-in-somalia/](http://security.blogs.cnn.com/2011/06/28/u-s-strikes-al-qaeda-affiliate-in-somalia/)

contractor bases have complicated precise estimates as to drone strike figures. According to Wired, regional United States bases operate up to twelve Predator and Reaper drones at a given time.<sup>69</sup>

### Strike Types

Military and CIA drone strike operations consist of two primary strike types – personality strikes and signature strikes. In conducting the former, the strike targets an individual or individuals whose identity or identities are known. In conducting the latter, the strike targets persons on the basis of their engagement in pre-identified “signature” behaviors, without establishing their actual identities. Though United States officials have tended to avoid disclosure of signature strike processes given their enhanced controversiality and potential for accidents, they are believed to account for a substantial proportion of covert drone strike operations, including the majority of strikes in Pakistan.<sup>70</sup> The United States has defended the practice, claiming twice as many “wanted terrorists” have been eliminated through signature strikes as compared with personality strikes.<sup>71</sup> Both personality and signature strikes may be pre-planned, following a calculated collateral-damage estimation report, or dynamic, following a quick decision to incoming, time-sensitive information.<sup>72</sup>

There have also been ample reports of “double-tap” strikes carried out by the United States. This is the practice of conducting second strikes in relatively close temporal proximity to initial strikes to “ensure that all individuals present in a ‘kill box,’ or designated area, are killed.”<sup>73</sup> These strikes have reportedly killed rescuers on the scene, which, in the context of an armed conflict, would raise questions under the Geneva Conventions.<sup>74</sup> Regardless of whether or not an armed conflict exists, any killing of rescuers likely amounts to a violation of principles of international human rights law.

The aforementioned strike types may be carried out to effectuate the elimination of persons on designated “kill lists.” Both the military and CIA, as well as the National Security Council, compile and maintain lists of targetable persons, though the processes of inclusion and

---

<sup>69</sup> David Axe, “Hidden History: America’s Secret Drone War in Africa,” *Wired*, August 13, 2012, <https://www.wired.com/2012/08/somalia-drones/>

<sup>70</sup> “The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions,” 9; Adam Entous, Siobhan Gorman and Julian E. Barns, “U.S. Tightens Drone Rules,” *The Wall Street Journal*, November 4, 2011, <https://www.wsj.com/articles/SB10001424052970204621904577013982672973836>

<sup>71</sup> “U.S. Tightens Drone Rules.”

<sup>72</sup> “The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions,” 11.

<sup>73</sup> “United States’ Compliance with the International Covenant on Civil and Political Rights,” Suggested List of Issues to Country Report Task Force on the United States, presented at the 107<sup>th</sup> Session of the Human Rights Committee of the Office of the High Commissioner for Human Rights, March 11-28, 2013, [https://tbinternet.ohchr.org/Treaties/CCPR/.../INT\\_CCPR\\_NGO\\_USA\\_14527\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/.../INT_CCPR_NGO_USA_14527_E.pdf)

<sup>74</sup> Remarks at “The Human Implications of Targeted Killings,” Geneva, Switzerland, June 21, 2012, cited in Jack Serle, “UN Expert Labels CIA Tactic Exposed by Bureau ‘A War Crime,’” *The Bureau of Investigative Journalism*, June 21, 2012, <https://www.thbureauinvestigates.com/stories/2012-06-21/un-expert-labels-cia-tactic-exposed-by-bureau-a-war-crime>

exclusion differ between the organizations.<sup>75</sup> Not all strikes, however, are carried out on this basis. It has been reported that drone strikes primarily kill lower-level militants, not likely to appear on a kill list.<sup>76</sup>

## PART II

### OVERVIEW OF APPLICABLE INTERNATIONAL LAW

Inquiry into the compatibility of United States armed drone strikes with the precepts of international law gives rise to several key questions implicating distinct corpora legis. The first of these is when may the United States engage in the use of such strikes. This is answered with reference to the tenets of *jus ad bellum*, the body of law regulating initiation of the use of force. The second question is how the United States is to go about conducting them, assuming their use is justified in the first place. To assess this query, recourse to international humanitarian law (IHL), also referred to as *jus in bello*, broadly in the presence of conflict and international human rights law (IHRL) broadly in the absence of conflict is necessary.

#### *When May Drone Strikes Be Conducted*

The relevant body of law governing the initiation of international uses of force may collectively be termed *jus ad bellum*. It sets forth the principles distinguishing between just and unjust recourse to war. The Charter of the United Nations, effective October 1945, codified the formal rule on the permissibility of the use of force in its Chapter I. Article 2(3) of the Chapter obliges all member states to “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” Article 2(4) then states that all members “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”

The plain language of 2(4) seems to denote a flat prohibition on the threat or use of force by a state in the conduct of its international relations and has, indeed, been widely understood to stand for such.<sup>77</sup> The provision, far from emerging as a novelty at the June 1945 San Francisco Conference, was a significant plot point in the longer evolutionary arch of international interest in constraining state-initiated international violence going back to the nineteenth century. Disillusioned by the theretofore prevailing prerogative of states to employ unbridled armed force against others at a whim, members of the international community convened at the

---

<sup>75</sup> “The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions,” 9.

<sup>76</sup> Peter Bergen and Katherine Tiedemann, “Washington’s Phantom War: The Effects of the U.S. Drone Program in Pakistan,” *Foreign Affairs*, July-August Issue, 2011, <https://www.foreignaffairs.com/articles/pakistan/2011-07-01/washingtons-phantom-war>

<sup>77</sup> Brooks, Rosa. “Drones and the International Rule of Law.” *Journal of Ethics and International Affairs* 28 (2014): 83-104. <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2296&context=facpub>

Hague for a peace conference in 1899. The convocation produced the Convention for the Pacific Settlement of International Disputes, creating the Permanent Court of Arbitration as an alternative, albeit non-binding, dispute resolution forum. After a monumental collapse of the Hague framework during World War I, the international community took reinvigorated interest in limiting the ability of a state to initiate force in pursuit of its own national interests, adopting the Covenant of the League of Nations. Its Articles X and XI consider “war or threat of war” against any individual member state to constitute a threat to the “whole League” and provide for a collective security framework. The League Assembly went further, passing unanimous resolutions between 1924 and 1927 condemning “wars of aggression” as international crimes.<sup>78</sup> The decade then culminated with conclusion of the notorious Kellogg-Briand Pact renouncing war as an instrument of national policy.

It was against the backdrop of this legacy – and its second epic failure in World War II – that 2(4) was included in the United Nations Charter. To the extent its language connotes a narrower meaning than a comprehensive blanket ban, a concern that arose among delegates at the San Francisco Conference, none other than the United States representative “made it clear that the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition [against the use of force].”<sup>79</sup> An early challenge to this position came before the newly-ordained International Court of Justice (ICJ) in the Corfu Channel case of the late 1940s when the suggestion was advanced that 2(4) did not prohibit force when it was not “directed against the territorial integrity or political independence of a state” or “inconsistent with the purposes of the United Nations.”<sup>80</sup> The Court summarily dismissed this position and has not revisited it since.

It is, thus, clear from the plain meaning of its language, the intent behind its drafting and its subsequent judicial interpretation that 2(4) constitutes an expansive prohibition against the international threat or use of force. International force within the meaning of 2(4) incontestably subsumes the threat or use of armed drone strikes. The relevant analysis lies not in the application of the 2(4), but rather, in its exceptions. Three discrete loopholes exist – United Nations Security Council authorization, self-defense and state consent. The first two are formally provided for by the Charter in Chapter VII, while the latter is a general principle addressed by the International Law Commission.

---

<sup>78</sup> Gordon, Edward. “Article 2(4) in Historical Context.” *Yale Journal of International Law* Vol. 10, Issue 2 (1985): 271-78. <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1327&context=yjil>

<sup>79</sup> Gordon, “Article 2(4) in Historical Context,” 267.

<sup>80</sup> Statement of Sir Erik Beckett, *United Kingdom of Great Britain and Northern Ireland v. People’s Republic of Albania*, 1948 I.C.J., Pleadings (Public Sitting of Nov. 11-12, 1948).

### *i. United Nations Security Council Authorization*

Provisions of Chapter VII bestow upon the Security Council wide latitude in peace-keeping responsibility, going further than Articles X and XI of the Covenant of the League of Nations.<sup>81</sup> Article 39 states that the Council “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression” and Article 42 provides it “may take such action by air, sea, or land as may be necessary to maintain or restore international peace and security,” should non-forceful means of restoration be deemed inadequate. This power manifests itself in practice through the passage of resolutions authorizing one or more member states to employ the use of force in securing Council enforcement objectives.

The initial use of force by the United States in Afghanistan following the attacks of September 11, 2001 arguably falls within the parameters of this exception. On September 12, the Security Council passed Resolution 1368 stating that “acts of international terrorism” amount to a “threat to international peace and security” and reaffirmed the “inherent right of individual or collective self-defense in accordance with the Charter.” It has been suggested that 1368 constituted implicit Security Council authorization of the United States-NATO strikes in Afghanistan,<sup>82</sup> a position generally supported by the Council’s subsequent creation of the International Security Assistance Force for Afghanistan (ISAF) pursuant to Resolution 1386 to bring the war under its formal international control. Even so, the persistence of United States actions in the region following the 2014 dissolution of ISAF raises questions.

### *ii. Self-Defense*

Self-defense has been a justification for the United States in its post-September 11 “war on terror” and international drone strike agenda. Article 51, the final of the Chapter VII articles, provides that nothing in the Charter “shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” The article can be broken down into three primary elements, each of which must be satisfied in order to trigger the “inherent right” of self-defense and, hence, justify the use of force.

#### *Armed Attack*

The first of these elements is that the state seeking the use of force suffer an armed attack. Though Article 51 does not offer any guidance as to what constitutes an armed attack, the ICJ has interpreted the term in two noteworthy opinions as involving force “greater than a mere frontier incident,”<sup>83</sup> though capable of being satisfied by a single incident if it is sufficiently

---

<sup>81</sup> The Council of the League could only recommend the initiation of force and was not binding. The Security Council has binding power to override the General Assembly.

<sup>82</sup> Brooks, “Drones and the International Rule of Law,” 92.

<sup>83</sup> *Republic of Nicaragua v. United States* (“*Military and Paramilitary Activities in and against Nicaragua*”), 1986 I.C.J. 14, 195

grave (e.g., the mining of a naval vessel).<sup>84</sup> In reaffirming the right to self-defense in Resolution 1368, the Security Council implicitly certified that the attacks of September 11 qualify as an armed attack. This does not, however, resolve apparent issues of temporal limitation.<sup>85</sup> The lone existence of an armed attack cannot provide indefinite license to employ force against the attacker (e.g., the United States cannot now attack Japan in response to the Pearl Harbor attack of 1941). United States drone strikes in Afghanistan seventeen years after the events of September 11, 2001 seem to, at the very least, test the flexibility of the temporal restriction. Furthermore, the ongoing strikes appear to neglect a key constraint qualifying the provision—that self-defense actions may be taken “until the Security Council has taken measures necessary to maintain international peace and security.”

The concept of anticipatory self-defense provides a possible cure to apparent legal infirmities inherent in the protracted nature of the Afghanistan campaign, as well as strikes against other non-al-Qaida groups. This doctrine, contentious within scholarly circles, rests foundationally upon the principle of imminence. In the 2002 National Security Strategy, the United States took it upon itself to “adapt the concept of imminent threat” and took the novel position that self-defense was appropriate in the absence of an imminent threat when “uncertainty remains as to the time and place of the enemy’s attack.”<sup>86</sup> The Department of Justice white paper from 2011 further clarified the United States’ position on imminence, stating that it “does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.”<sup>87</sup> The most recent National Security Strategy of December 2017 continues the embrace of preemptive action, stating that its mission must be to “deter, disrupt, and defeat potential threats before they reach the United States.”<sup>88</sup>

This expansive conception of imminence to justify preemptive aggression, however, does not accord with common understandings of international law on the matter. Imminence has generally been interpreted to fall within the narrow confines of the Caroline Standard,<sup>89</sup> which provides that an imminent threat sufficient to sanction a preemptive response only arises when “the necessity of self-defense is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.”<sup>90</sup> This framework is sharply juxtaposed to the United States’ position.

---

<sup>84</sup> *Islamic Republic of Iran v. United States*, 2003 I.C.J. 4 (“Case Concerning Oil Platforms”)

<sup>85</sup> Brooks, “Drones and the International Rule of Law,” 93.

<sup>86</sup> The White House. *National Security Strategy of the United States of America* (Washington D.C.: The White House, 2002), 15, <https://librarybestbets.fairfield.edu/citationguides/chicagonotes-bibliography#GovernmentalandOrganizationalReports>

<sup>87</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” Department of Justice, released February 4, 2013.

<sup>88</sup> The White House. *National Security Strategy of the United States of America* (Washington D.C.: The White House, 2017), 7, <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>

<sup>89</sup> International Bar Association. *The Legality of Armed Drone Strikes under International Law: Background Paper by the International Bar Association’s Human Rights Institute* (London: International Bar Association, 2017), 14, [https://www.ibanet.org/Human\\_Rights\\_Institute/HRI\\_Publications/Legality-of-armed-drone-strikes.aspx](https://www.ibanet.org/Human_Rights_Institute/HRI_Publications/Legality-of-armed-drone-strikes.aspx)

<sup>90</sup> Daniel Webster. “Letter to Henry Stephen Fox” in *The Papers of Daniel Webster: Diplomatic Papers, Vol. 1 1941-1843*, edited by K.E. Shewmaker. New England: Dartmouth College Press, 1983. Daniel Webster, the United States Secretary of State from

It is far from clear that current targets of United States drone strikes pose a threat that is “instant” and “overwhelming” and leaving “no moment of deliberation.” Furthermore, it is also far from clear that no alternative “choice of means,” such as capture and trial in accordance with dictates of due process, is available. Even under more flexible interpretations of imminence,<sup>91</sup> the United States’ notion of the preemptive uses of force in the absence of imminent threat are not compatible with consensus views of Article 51.<sup>92</sup>

Another possible frailty in the United States’ view lies in the uncertainty surrounding whether or not the armed attack requirement encompasses attacks from non-state actors. Multiple opinions of the ICJ have touched on the matter. In a 2004 advisory opinion concerning the legality of Israel’s construction of a border wall in the occupied West Bank, the Court rejected Israel’s Article 51 argument that it was exercising its right to self-defense against terrorist attacks, stating “Israel does not claim that the attacks against it are imputable to a foreign state.”<sup>93</sup> A year later, in *Democratic Republic of the Congo v. Uganda*, the Court again declined a self-defense argument on grounds of the absence of a qualifying armed attack. As it found no satisfactory evidence that the Congolese government was involved with attacks perpetrated against Uganda, the Court found that Uganda was not entitled to a claim of self-defense for its uses of force against the Congolese.<sup>94</sup> The treatment of the armed attack requirement in both opinions appears to follow the seminal 1986 case of *Republic of Nicaragua v. United States of America* in so far as it is interpreted to require a nexus between the armed attack and a state government.

In spite of seemingly contrary ICJ jurisprudence on the matter, it has been argued that the nexus requirement actually refers to state responsibility, as opposed to armed attack determination.<sup>95</sup> Even tenuously assuming the United States can skirt the lack of operational connection between al-Qaida and the governments of Afghanistan and Pakistan, its strikes against other groups, like al-Shabaab in Somalia, remain seemingly without legal justification.

---

1850-52, wrote that in conducting an anticipatory strike against an adversary, a self-defense claimant would have to show that the necessity of the strike was “instant, overwhelming, and leaving no choice of means, and no moment of deliberation.” His statement was in response to the United Kingdom’s claim of self-defense in the *Caroline* Affair, in which United Kingdom forces seized a vessel from Canadian rebels, killing a United States citizen crew member, and sent it aflame over the Niagara Falls.

<sup>91</sup> See Elizabeth Wilmshurst. “The Chatham House Principles of International Law on the Use of Force in Self-Defense.” *International & Comparative Law Quarterly*, Vol. 55, Issue 4 (2006): 963-72, <https://www.chathamhouse.org/publications/papers/view/108106>

<sup>92</sup> David Luban. *Preventative War and the U.N. Charter*. Presentation to the American Society of International Law, Washington, D.C. (Dec. 3, 2009); Dworking, Anthony. “Drones and Targeted Killing: Defining a European Position.” *European Council on Foreign Relations*, (July 2013). [https://www.ecfr.eu/publications/summary/drones\\_and\\_targeted\\_killing\\_defining\\_a\\_european\\_position211](https://www.ecfr.eu/publications/summary/drones_and_targeted_killing_defining_a_european_position211)

<sup>93</sup> *Advisory Opinion Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 2004 I.C.J. 139, 194.

<sup>94</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* 2005 I.C.J. 146, 222-23.

<sup>95</sup> J.A. Green, *The International Court of Justice and Self-Defence in International Law* (Oxford: Oxford Hart Publishing, 2009), 50.

## Necessity

The second element of self-defense is necessity. Under this requirement, “[t]he right to self-defense persists only so long as it is necessary to halt or repel an armed attack.”<sup>96</sup> Separate and distinct from establishing a connection between the non-state perpetrator of the armed attack and the host state, a central issue that arises under this element is the extent to which a state’s willingness and ability to neutralize an internal threat is subsumed under the legal conception of necessity. Proponents of the unwilling-unable doctrine suggest that the failure – either due to reluctance or lack of capacity – of a host state to quell internal threats to external state actors amounts to legal necessity, supporting a right of self-defense in the latter.<sup>97</sup> Multiple states have embraced this proposition. For instance, Israel relied on the doctrine in its uses of force against Hezbollah and Palestine Liberation Organization operatives in Lebanon in 1981.<sup>98</sup> Turkey did so similarly in its attacks against the Kurdistan Workers’ Party in 1996<sup>99</sup> along with Russia in its skirmishes with Chechen groups in Georgia in 2002.<sup>100</sup> Others, like Syria,<sup>101</sup> have formally opposed it.

The United States, though critical of Russia for its past invocation, has itself explicitly embraced the doctrine. Obama, while still a presidential candidate in 2008, stated that “[i]f we have actionable intelligence about high-valued terrorist targets and if President Musharraf [of Pakistan] will not act, we will.”<sup>102</sup> Once in office, he followed through on this pledge. In addition to carrying out drone strike operations in Pakistan in every year of his presidency, he notably authorized Operation Neptune Spear in which a CIA-led JSOC team entered Pakistan without consent and summarily executed bin Laden. When the Pakistani government objected

---

<sup>96</sup> Christof Heyns. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc A/68/38 (New York: United Nations General Assembly, September 13, 2013), 19 <http://justsecurity.org/wp-content/uploads/2013/10/UN-Special-Rapporteur-Extrajudicial-Christof-Heyns-Report-Drones.pdf>; Oliver Corten. “The ‘Unwilling or Unable’ Test: Has it Been, And Could it Be, Accepted?” *Leiden Journal of International Law* (2016): 777-99, <http://cdi.ulb.ac.be/wp-content/uploads/2012/12/OC-Leiden.pdf>

<sup>97</sup> See “Leiden Policy Recommendations on Counter-Terrorism and International Law in Schrijver” in *Counter-Terrorism Strategies in a Fragmented International Legal Order*, eds. Nico Schrijver and Larissa van den Henrik (Cambridge: Cambridge University Press, 2013).

<sup>98</sup> U.N. SCOR, 36th Sess., 2292d mtg. at 5, U.N. Doc. S/PV.2292 (July 17, 1981),

<https://unispal.un.org/DPA/DPR/unispal.nsf/0/43220E2368A3DDF7052568000052412C>

<sup>99</sup> Minister for Foreign Affairs of Turkey, Letter dated July 2, 1996 from the Minister for Foreign Affairs of Turkey addressed to the Secretary-General and to the President of the Security Council, U.N. Doc. S/1996/479 (July 2, 1996),

[http://dag.un.org/bitstream/handle/11176/41261/S\\_1996\\_479-EN.pdf?sequence=3&isAllowed=y](http://dag.un.org/bitstream/handle/11176/41261/S_1996_479-EN.pdf?sequence=3&isAllowed=y)

<sup>100</sup> Permanent Rep. of the Russian Federation to the U.N., Letter dated Sept. 11, 2002 from the Permanent Rep. of the Russian Federation to the United Nations addressed to the Secretary General, Annex, U.N. Doc. S/2002/1012/Annex (Sept. 12, 2002), [http://repository.un.org/bitstream/handle/11176/29079/S\\_2002\\_1012-EN.pdf?sequence=3&isAllowed=y](http://repository.un.org/bitstream/handle/11176/29079/S_2002_1012-EN.pdf?sequence=3&isAllowed=y)

<sup>101</sup> *Identical Letters from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, A/70/673 (December 29, 2015),

<https://digitallibrary.un.org/record/816573>

<sup>102</sup> *Presidential Candidates Debate Pakistan*, MSNBC (February 28, 2008), [http://www.nbcnews.com/id/23392577/ns/politics-decision\\_08/t/presidential-candidates-debate-pakistan/#.XBk7YSB7laQ](http://www.nbcnews.com/id/23392577/ns/politics-decision_08/t/presidential-candidates-debate-pakistan/#.XBk7YSB7laQ)

to what it called an “unauthorized unilateral action,” the United States responded that apprising Pakistani officials in advance would have compromised the operation.<sup>103</sup>

Acknowledgement of the relationship between a belligerent state and a neutral state when the latter’s territory and resources are being used by the former’s adversary is not a recent phenomenon. In his 1895 *Treatise on International Law*, William Hall noted

[t]he right of self-preservation in some cases justifies the commission of acts of violence against a... neutral state, when from its position and resources it is capable of being made use of to dangerous effect by an enemy, when there is a known intention on his part so to make use of it and when, if he is not forestalled, it is almost certain that he will succeed, either through the helplessness of the country or by means of intrigues with a party within it.<sup>104</sup>

Other sources have since articulated a general principle in neutrality law that a belligerent state may be permitted to use force within the territory of a neutral state if it is unwilling or unable to prevent the belligerent state’s adversary from violating its neutrality.<sup>105</sup> The United States even references the principle in official military manuals from the 1950s.<sup>106</sup>

While this proposition, which some have even argued rises to the level of customary international law,<sup>107</sup> is undeniably an internationally-recognized norm, its actual meaning and scope have not historically been well defined. Recent efforts to endow the principle with some material substance in assessing when its invocation might fall within legal bounds include the delineation of such factors as prioritization of neutral state consent and cooperation, formal request that the neutral state address the threat prior to any use of force, nature and severity of threat within the neutral state and reasonable assessment of the neutral state’s control over the threat and its capacity to address it.<sup>108</sup>

---

<sup>103</sup> Alan Cowell, “Pakistan Sees Shared Intelligence Lapse,” *The New York Times*, May 4, 2011, <https://www.nytimes.com/2011/05/05/world/asia/05react.html?mtrref=www.google.com&gwh=C13DFFCAF5B9F79965F805E82719A020&gwt>

<sup>104</sup> William Hall, *Treatise on International Law* (Oxford: Clarendon Press, 1895), 284-85.

<sup>105</sup> See Charles Chaney Hyde, *International Law: Chiefly Interpreted and Applied by the United States* (Cambridge: Cambridge University Press, 1945); Erik Castren, *The Present Law of War and Neutrality* (Helsinki: Suomalainen Tiedakkemia, 1954); Morris Greenspan, *The Modern Law of Land Warfare* (Cambridge: Cambridge University Press, 1959).

<sup>106</sup> Field Manual 27-10 (Department of Army, July 1956), Para. 520, [https://www.loc.gov/rr/frd/Military\\_Law/pdf/law\\_warfare-1956.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf). “Should the neutral State be unable, or fail for any reason, to prevent violations of its neutrality by the troops of one belligerent entering or passing through its territory, the other belligerent may be justified in attacking the enemy forces on this territory.”

<sup>107</sup> John Norton Moore, “Legal Dimensions of the Decision to Intercede in Cambodia,” *American Journal of International Law*, Vol. 65, Issue 1 (January 1971), 38-75, <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/legal-dimensions-of-the-decision-to-intercede-in-cambodia/A198FD3570D238DCEFCAD59B4BC269FB>

<sup>108</sup> Ashley Deeks, “Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense,” *Virginia Journal of International Law*, 52 (2011-2012), 483-550, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/vajint52&div=18&id=&page=>

### Proportionality

The final element is proportionality. In Nicaragua, the ICJ stated that customary international law on self-defense requires that any uses of force to this end be proportional to the original armed attack,<sup>109</sup> a proposition which it reaffirmed a decade later in its Nuclear Weapons advisory opinion.<sup>110</sup> While proportionality in the jus in bello context is well understood as assessing the excessiveness of collateral damage in relation to the expected military advantage, its meaning in the jus ad bellum sphere is the topic of ongoing debate. Some international law experts contend that forceful acts of self-defense must be proportionate to the original act to which they are responding<sup>111</sup> – the so-called “tit-for-tat” approach. Others suggest that the proportionality of forceful self-defense should be measured against the potential threat.<sup>112</sup> Still others argue that legitimacy of the end in using force is to be the relevant point of reference.<sup>113</sup>

The lack of consensus on these competing interpretations renders the proportionality requirement largely indeterminate. This phenomenon is exemplified by a 2006 newsletter from the American Society of International Law (ASIL), in which multiple international lawyers were tasked with assessing “the recent conflict between Israel and Hezbollah (i.e., the Israeli invasion of Lebanon in July 2006) in terms of the jus ad bellum... rules requiring necessity and proportionality.”<sup>114</sup> One respondent noted that the relevant inquiry was whether or not the Israeli force was proportionate in line with the legitimate end of deterring future Hezbollah attacks. Under this understanding, the respondent concluded that Israeli aggression was self-defense. Another suggested that the Israeli response—a barrage of air, artillery and ground attacks by the Israel Defense Forces leading to the deaths of approximately eleven-hundred Lebanese<sup>115</sup>—to Hezbollah’s killing of eight Israeli soldiers and capture of two was blatantly disproportionate and, thus, an illegitimate act of self-defense.

ICJ jurisprudence sheds some light on the debate, but has not been dispositive. In *Oil Platforms*, the Court addressed the proportionality of the United States’ destruction of Iranian oil platforms in October 1987 (Operation Nimble Archer) and April 1988 (Operation Praying Mantis) in response to damage suffered to the USS Samuel B. Roberts, an American frigate, as a result of Iranian-origin mines. It stated:

---

<sup>109</sup> *Republic of Nicaragua v. United States* (“*Military and Paramilitary Activities in and against Nicaragua*”), 1986 I.C.J. 14, 176

<sup>110</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 2, 41

<sup>111</sup> Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (New York: Routledge, 1993).

<sup>112</sup> Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963).

<sup>113</sup> Oliver Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Portland: Hart Publishing, 2010).

<sup>114</sup> American Society of International Law, “Newsletter” 22(5) (September–October 2006) in David Kretzmer, “The Inherent Right to Self-Defense and Proportionality in Jus Ad Bellum,” *European Journal of International Law*, Vol. 24, No. 1 (2013), 235–82, 236, <http://www.ejil.org/article.php?article=2380&issue=114>

<sup>115</sup> Human Rights Watch, “Israel/Lebanon: Israeli Indiscriminate Attacks Killed Most Civilians,” (September 5, 2017), <https://www.hrw.org/news/2007/09/05/israel/lebanon-israeli-indiscriminate-attacks-killed-most-civilians#>

[The Court] cannot close its eyes to the scale of the whole operation... As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither “Operation Praying Mantis” as a whole, nor even that part of it that destroyed the [Iranian] Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defense.<sup>116</sup>

The opinion arguably lends support to the “tit-for-tat” approach, considering the “scale of the whole operation” by the United States in light of the gravity of the original incident – the damage sustained to the American warship. Still, this framework has been argued to be too narrow<sup>117</sup> and indeterminacy persists.

### *iii. Consent*

In addition to and distinct from self-defense, the United States has cited consent as legitimation for its international drone strike operations. The 2011 DOJ white paper, for instance, states that “a lethal operation in a foreign nation would be consistent with international legal principles of sovereignty and neutrality if it were conducted, for example, with the consent of the host nation’s government...”<sup>118</sup> Though not appearing as an Article 2(4) exception in Chapter VII, or anywhere else in the United Nations Charter, the International Law Commission addresses consent in Article 20 of its Draft Articles on Responsibility of States for Internationally Wrongful Acts. It states:

Valid consent by a state to the commission of a given act by another state precludes the wrongfulness of that act in relation to the former state to the extent that the act remains within the limits of that consent.<sup>119</sup>

The commentary in paragraphs (4) and (6) state that “valid consent” requires an expression of consent from an official of a legitimate government authorized to do so and that such consent be freely given and clearly established. The legitimacy of a government for consenting purposes is rooted primarily in the government’s de jure control,<sup>120</sup> irrespective of whether or not it retains physical control over the entirety of the state. Furthermore, Article 20 references “limits” of consent, suggesting that acts of the intervening state falling outside the scope of the

<sup>116</sup> *Islamic Republic of Iran v. United States of America* (“Oil Platforms”), 2003 I.C.J. 161, Para. 77.

<sup>117</sup> Antonio Cassese, *International Law*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2005).

<sup>118</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” *Department of Justice*, released February 4, 2013, 1, <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dept-white-paper.pdf>

<sup>119</sup> “International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,” General Assembly Official Records 56<sup>th</sup> Session, supplement no. 10 (A/56/10), 2006, [legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)

<sup>120</sup> Louise Doswald-Beck, “The Legal Validity of Military Intervention by Invitation of the Government,” *British Yearbook of International Law*, Vol. 56, Issue 1 (1986), 189-252, 199, <https://kcl.rl.talis.com/items/9A4464C8-BBB9-09A9-BC62-E244E432254D.html>

consent are not legitimized. Additionally, it stipulates that wrongfulness is not precluded for non-jus ad bellum transgressions of international law (e.g., violations of IHL or IHRL).<sup>121</sup>

### ***How May Drone Strikes Be Conducted***

The laws governing how force may be conducted fall under two corpora legis – IHL and IHRL. The former generally applies in cases of armed conflict with the latter applying otherwise. Where the two overlap, recourse to the doctrine of *lex specialis*<sup>122</sup> provides a mechanism for resolving conflict of law issues.

#### *i. International Humanitarian Law*

IHL generally governs the use of force in circumstances where an international armed conflict or a non-international armed conflict prevail. It sets the parameters for delineating how force may legitimately be used by a state engaged in conflict, irrespective of the legitimacy of the state's initiation of that force under jus ad bellum principles. As compared with IHRL, it tends to be more accommodating of the use of force and can render interpretation of competing IHRL rights and protections less restrictive than they otherwise would be in peacetime. An IHL analysis proceeds with the all-important determination of whether or not an armed conflict exists, followed by an assessment of the applicability of individual IHL principles.

#### International Armed Conflict

As per Common Article 2 of the 1949 Geneva Conventions, an international armed conflict exists in “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” As such, the characterization is objective, independent of such subjective considerations as whether or not the parties deem themselves to be at war with one another. The argument has arisen that a state's attack of an armed group in another without the host state's consent creates a kind of international armed conflict.<sup>123</sup> This position, however, is controversial.<sup>124</sup>

#### Non-International Armed Conflict

The classification of non-international armed conflict (NIAC) is the one most relevant to analysis of the United States' international drone strike operations. An NIAC has been defined as “protracted armed violence between governmental authorities and organized armed groups or

---

<sup>121</sup> *The Legality of Armed Drone Strikes under International Law: Background Paper by the International Bar Association's Human Rights Institute*, 10.

<sup>122</sup> In instances of concomitance between IHL and IHRL principles, the doctrine of *lex specialis derogat generali* dictates that the more specific of the competing laws prevails over the more general when the two cannot be construed in a consistent manner.

<sup>123</sup> Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (Cambridge: Cambridge University Press, 2010)

<sup>124</sup> *The Legality of Armed Drone Strikes under International Law: Background Paper by the International Bar Association's Human Rights Institute*, 21.

between such groups within a state.”<sup>125</sup> Additionally, the International Law Association further clarified that inherent in this definition is the requirement that the “armed violence” be sufficiently intense and that the “armed groups” be sufficiently organized in order for an NIAC to exist.<sup>126</sup> Though Additional Protocol II of 1977 imposes a more stringent standard, demanding non-state armed groups be “under responsible command” and “exercise such control over a part of [the state’s] territory as to enable them to carry out sustained and concerted military operations,”<sup>127</sup> the United States is one of a small collection of countries having not ratified the Protocol, which has not yet risen to the level of customary international law. As such, the former definition applies.

#### (A) Organization

Sufficient organization of participating armed groups is a key element in the determination of an NIAC. In its *Boskoski & Tarculovski* judgement, the International Criminal Tribunal for the Former Yugoslavia (ICTY) maintained that “the degree of organization required to engage in ‘protracted violence’ is lower than the degree of organization required to carry out ‘sustained and concerted military operations,’”<sup>128</sup> the requirement of Additional Protocol II. Consequently, the level of organization required in order to constitute an armed group for purposes of an NIAC is lower than that of a national armed force. The ICTY has identified multiple factors in the analysis of sufficient organization. These are “the existence of headquarters, designated zones of operation and the ability to procure, transport and distribute arms,”<sup>129</sup> as well as the use of checkpoints<sup>130</sup> and spokespersons.<sup>131</sup> Furthermore, armed groups must have a “command structure”<sup>132</sup> and must be able to speak with “one voice”<sup>133</sup> and “formulate military tactics.”<sup>134</sup>

#### (B) Intensity

The ICTY has suggested that the intensity analysis is to be undertaken on a case-by-case basis, stating it should consider:

---

<sup>125</sup> *Prosecutor v. Tadic*, IT-94-A, Appeals Chamber Judgement (1999), para. 70

<sup>126</sup> “Final Report on the Meaning of Armed Conflict in International Law,” International Law Association, Hague Conference (2010), 2, [www.rulac.org/assets/downloads/ILA\\_report\\_armed\\_conflict\\_2010.pdf](http://www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf)

<sup>127</sup> “Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts,” June 8, 1977, Art. 1.1

<sup>128</sup> *Prosecutor v. Boskoski & Tarculovski*, IT-04-82-T, Trial Chamber Judgement (2008), para. 197

<sup>129</sup> *Prosecutor v. Limaj, Bala & Musliu*, IT-03-66-T (2005), para. 90

<sup>130</sup> *Prosecutor v. Haradinaj, Balaj & Brahimaj*, I-04-84-T (2008), para. 71

<sup>131</sup> *Limaj, Bala & Musliu*, para. 101-03

<sup>132</sup> *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Motion for Judgement of Acquittal (2004), para. 23-24

<sup>133</sup> *Haradinaj, Balaj & Brahimaj*, para. 60

<sup>134</sup> *Haradinaj, Balaj & Brahimaj*, para. 129

[t]he seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilization and distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed.<sup>135</sup>

Duration of the violence is variable and can be brief. For instance, the Inter-American Commission on Human Rights found the intensity of armed violence lasting only thirty hours to be sufficient for purposes of an armed conflict because it was a “carefully planned, coordinated and executed armed attack, i.e., a military operation against a quintessential military objective.”<sup>136</sup>

### Substance of IHL

The substance of IHL is comprised of principles which must be followed in carrying out the use of force in the course of an armed conflict. As drones have not to date been considered inhumane or indiscriminate weapons under the Convention on Certain Conventional Weapons or subject to any other international legal instrument-based restrictions, it is these general IHL principles that presently regulate the permissibility of their use in armed conflicts.

#### *(A) Distinction*

The principle of distinction is formally expressed in Article 48 of Additional Protocol I. It states that in order to ensure the protection of civilian persons and objects, “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” Article 13(2) of Additional Protocol II also states that the “civilian population as such, as well as individual civilians, shall not be the object of attack.” What is more, this rule has been elevated to the status of customary international law, making it binding on all parties, regardless of whether or not they have ratified the Protocols.<sup>137</sup> In an international armed conflict, members of armed forces party to the conflict may legitimately be targeted by opposing forces. All other persons are deemed civilians. In an NIAC, Article 13(3) of Additional Protocol II states that civilians may lose their protected status “for such time as they take a direct part in hostilities.” Otherwise, they are protected.

#### *(B) Precaution*

Complementary of distinction is the principle of precaution. Article 57(1) of Additional Protocol I requires that “[i]n the conduct of military operations, constant care shall be taken to spare the

---

<sup>135</sup> *Limaj, Bala & Musliu*, para. 90

<sup>136</sup> *Abella v. Argentina*, Inter-American Commission on Human Rights, Report No. 55/97, Case No. 11.137 (1997), para. 155

<sup>137</sup> *The Legality of Armed Drone Strikes under International Law: Background Paper by the International Bar Association's Human Rights Institute*, 24-25.

civilian population, civilians and civilian objects.” In so doing, Article 57(2) requires that multiple precautions be taken. These include doing “everything feasible” to verify the non-civilian nature of attack objectives and the provision of advanced warning prior to attacks expected to harm civilian persons or objects where practicable. Precaution has been determined to be customary international law and is, thus, universally required.<sup>138</sup>

### *(C) Proportionality*

Article 57(2)(a)(iii) of Additional Protocol I states that a combatant must “refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Unlike in its *jus ad bellum* application, the meaning of proportionality in the IHL context is conclusively understood. Incidental harm to civilian persons and objects must not be excessive in relation to “concrete and direct military advantage” to be gained from an attack. Like distinction and precaution, the dictates of proportionality are customary international law.

### *(D) Necessity*

The principle of military necessity is addressed in Articles 52(2) and 54(5) of Additional Protocol I and Article 17 of Additional Protocol II. The principle essentially states that measures necessary to the attainment of a legitimate military purpose are permissible, so long as they do not explicitly controvert other IHL principles. Accordingly, the principle of military necessity serves both a permissive role in allowing for the commission of necessary forceful acts and a restrictive one in confining any potential uses of force to situations necessary to accomplish legitimate military purposes.

### *(E) Humanity*

The principle of humanity operates to temper the expansiveness of military necessity by countering the potential presumption that acts not expressly proscribed by IHL principles are permissible. Its origins lie in the Martens Clause, first appearing in the Preamble to Hague Convention II of 1899. It stated that “in cases not included in the regulations adopted by [the High Contracting Parties], populations and belligerents remain under the protection and empire of the principles of international law . . . [and] the laws of humanity and the requirements of the public conscience.” The principle has subsequently been included in Article 1(2) of Additional Protocol I and in the Preamble of Additional Protocol II, stating in slightly modified fashion that “in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.” That the humanity principle provides additional substantive protections above and beyond specific IHL principles has been more recently supported by Judge Mohamad Shahabuddeen of the ICJ in his

---

<sup>138</sup> *The Legality of Armed Drone Strikes under International Law: Background Paper by the International Bar Association's Human Rights Institute*, 26.

dissenting opinion in the Nuclear Weapons advisory opinion, indicating that the Martens Clause provides:

its own self-sufficient and conclusive authority for the proposition that there were already in existence principles of international law under which considerations of humanity could themselves exert legal force to govern military conduct in cases in which no relevant rule was provided by conventional law. Accordingly, it was not necessary to locate elsewhere the independent existence of such principles of international law; the source of the principles law in the Clause itself.<sup>139</sup>

The International Committee of the Red Cross has adopted a similar understanding in its interpretation of IHL, suggesting that the lethal use of force is limited when non-lethal alternatives exist.<sup>140</sup> The basis for such a position in substantive international law, however, remains contentious.<sup>141</sup>

### Additional Considerations

#### *(A) Subjectivity in Targeting*

It is important to note that, as per Article 52(2) of Additional Protocol I, legal assessment of targeting decisions proceed on the basis of the subjective state of mind of the decision-maker at the time of decision. This proposition is additionally supported by Articles 57(2)(a)(iii) and 51(5)(b) concerning proportionality's requirement of anticipated "concrete and direct military advantage." As such, a possible loophole exists – targeting decisions that prima facia violate applicable IHL principles may not be unlawful if the decision-maker believed at the time that the targeting decision would not violate those principles. However, as the International Bar Association points out, the subjectivity element also mandates that targeting decisions be made on the basis all available information.<sup>142</sup> This can pose a heavy burden on decision-makers and render strikes that fail to distinguish between military and civilian objectives more likely to be unlawful where relevant information could feasibly have been consulted.

#### *(B) Prohibition Against the Denial of Quarter*

The prohibition against the denial of quarter, first appearing in Article 60 of the 1863 Lieber Code, is an old principle limiting the conduct of hostilities. It made clear that "[i]t is against the

---

<sup>139</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 2, dissenting opinion of Judge Shahabuddeen, 408.

<sup>140</sup> Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (Geneva: International Committee of the Red Cross, 2009).

<sup>141</sup> Dapo Akande, "Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities," *European Journal of International Law* (Blog), June 4, 2009, <https://www.ejiltalk.org/clearing-the-fog-of-war-the-icrcs-interpretive-guidance-on-direct-participation-in-hostilities/>

<sup>142</sup> *The Legality of Armed Drone Strikes under International Law: Background Paper by the International Bar Association's Human Rights Institute*, 27.

usage of modern war to resolve, in hatred and revenge, to give no quarter.” The obligation to accept surrender also appeared in Article 23 of the Hague Convention IV of 1907, including in its list of prohibited actions “[t]o declare that no quarter will be given.” Article 40 of Additional Protocol I captures the contemporary iteration of the principle, providing that “[i]t is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.”

The prohibition may have potential implications for United States targeted drone killing operations abroad. Ofilio Mayorga<sup>143</sup> notes that as drones launching Hellfire missiles cannot take prisoners, the specter of denial of quarter infractions may be raised. While denial of quarter “cannot be reasonably interpreted to prevent belligerents from resorting to surprise attacks of instantaneous lethality or to employ units and weapons systems which are incapable of taking prisoners,”<sup>144</sup> he suggests that the presence of troops on the ground may be of legal significance. Where drone strikes facilitating ground troop operations leave open the theoretic possibility that injured strike subjects might subsequently be captured, purely remote strikes offer no opportunity for the acceptance of surrender. Accordingly, moves by the government to protect United States personnel by removing ground forces and placing greater reliance on remote strike capabilities could possibly risk legal liability under Article 40.<sup>145</sup>

## ii. *International Human Rights Law*

IHRL applies in all cases where no international or non-international armed conflicts exist to trigger IHL. Additionally, the ICJ has affirmed near unanimous consensus on the position that IHRL principles can also apply in armed conflicts, stating “the protection offered by human rights conventions does not cease in case of armed conflict.”<sup>146</sup> In the counterterrorism context, the United Nations has stressed the applicability of IHRL in Pillar IV of its Global Counter-Terrorism Strategy. It notes that states “must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law . . . and international humanitarian law.”<sup>147</sup> IHRL analyses are bipartite with a jurisdictional assessment preceding application of substantive principles.

### Jurisdiction

The International Covenant on Civil and Political Rights (ICCPR), a primary source of human rights law, states in Article 2(1) that every state party must respect the Covenant’s protections

---

<sup>143</sup> Ofilio Mayorga is an International Associate at the Washington, D.C., office of Foley Hoag, LLP. He is researching the possible application of the denial of quarter principle to international drone strike operations.

<sup>144</sup> Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008), 370-71.

<sup>145</sup> Ofilio Mayorga, “Wars Without Prisoners: Denying Quarter in the Age of Drone Warfare” (presentation of draft paper, Midyear Meeting of the American Society of International Law, Los Angeles, California, November 8-10, 2018).

<sup>146</sup> *Advisory Opinion Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 2004 I.C.J. 139, para. 106.

<sup>147</sup> “United Nations Global Counter-Terrorism Strategy,” United Nations Office of Counter-Terrorism, adopted 2006, <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy#poa4>

for individuals “within [that state’s] territory and subject to [that state’s] jurisdiction.” This has led some, including the United States,<sup>148</sup> to adopt the position that these protections only apply to persons who are both within the territory of the state party and within the state party’s jurisdiction.<sup>149</sup> This restrictive interpretation is contrary to the express view of the Human Rights Committee of the United Nations Office of the High Commissioner for Human Rights (OHCHR) that Article 2(1) “means that a state party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that state party, even if not situated within the territory of that state party.”<sup>150</sup> Furthermore, the ICJ found that international human rights instruments are applicable “in respect of facts done by a state in the exercise of its jurisdiction outside its own territory.”<sup>151</sup> The Court subsequently reaffirmed this stance in Uganda.<sup>152</sup>

Common understanding envisions several primary bases for extraterritorial jurisdiction. One is effective control of geographic areas outside a state’s territorial integrity. This basis was acknowledged by the European Court of Human Rights (ECtHR) in *Bankovic v. Belgium* as an exception to the narrow jurisdictional view espoused by the United States.<sup>153</sup> In such circumstances, the state is deemed to have jurisdiction over actions occurring within the region by virtue of its geographic control. The quintessential example of this form of control is that of occupation. An occupying power has jurisdiction over its occupied territories. The ECtHR has also found that a state may have jurisdiction even before its invading forces have “assumed responsibility for the maintenance of security” in a region.<sup>154</sup>

A second basis arises when a state has personal control over an individual, irrespective of whether or not it has control over the geographic region where the individual is located.<sup>155</sup> For example, a state is deemed to have personal control over individuals it has detained. The ECtHR has loosened the requirements for personal control somewhat, finding that a state can

---

<sup>148</sup> “Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant,” Fourth Periodic Report, United Nations Human Rights Committee, December 30, 2011, para. 505, <https://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.USA.4.doc>. The United States was involved in the drafting of the ICCPR in the late 1940s and early 1950s and ratified the Covenant in 1992. See also, Marko Milanovic, “Foreign Surveillance and Human Rights, Part 2: Interpreting the ICCPR,” *European Journal of International Law* (Blog), November 26, 2013, <https://www.ejiltalk.org/foreign-surveillance-and-human-rights-part-2-interpreting-the-iccpr/>

<sup>149</sup> Michael J. Dennis, “Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around?” *Journal of International & Comparative Law*, Vol. 12, Issue 2, <https://nsuworks.nova.edu/ilsajournal/vol12/iss2/5/>

<sup>150</sup> “Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant,” para. 505.

<sup>151</sup> *Advisory Opinion Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 2004 I.C.J. 139, para. 107.

<sup>152</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* 2005 I.C.J. 146, para. 216-217.

<sup>153</sup> *Bankovic v. Belgium*, 52207/99 ECHR 2001

<sup>154</sup> *Hassan v. United Kingdom*, 29750/09 ECHR 2014, 75.

<sup>155</sup> *The Legality of Armed Drone Strikes under International Law: Background Paper by the International Bar Association’s Human Rights Institute*, 34-35.

have personal control jurisdiction over individuals merely passing through checkpoints administered by the state.<sup>156</sup> The OHCHR Human Rights Committee advocates further relaxation, contending “it would be unconscionable to so interpret the responsibility under Article 2 [of the ICCPR] as to permit a state party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory.”<sup>157</sup> It has proposed an act-based understanding which would render “anybody directly affected by a state party’s actions” subject to the jurisdiction of that state party.<sup>158</sup>

International jurisprudence is arguably moving in the direction of a more expansive jurisdictional framework in the area of human rights protections. In *Al-Saadoon v. Secretary of State for Defense*, Lord Justice George Leggatt of the High Court of Justice in the United Kingdom captured this transition in stating that the “[use of] force to kill is indeed the ultimate exercise of physical control over another human being.”<sup>159</sup> This sentiment gravitates toward the view that the appropriate legal test in jurisdictional determinations should be “the exercise of authority or control over the individual in such a way that the individual’s rights are in the hands of the state.”<sup>160</sup> With respect to drone operations, the International Bar Association also submits that “a finding that IHRL is inapplicable to the victims of extraterritorial drone strikes by virtue of jurisdiction when such law would be applicable in situations of detention is unconscionable and runs counter to the object and purpose of numerous human rights treaties.”<sup>161</sup>

Finally, in *Bankovic*, the ECtHR noted that IHRL principles apply to the actions of a state carried out in another state “through the consent, invitation or acquiescence of the government” of the other state.<sup>162</sup> This would provide a jurisdictional basis for United States drone strike operations in states pursuant to the consent of those states’ governments.

### Substance

The substance of IHRL, codified in such treaties as the ICCPR, sets forth basic protections for individuals. States are obliged to recognize these protections for all persons within their

---

<sup>156</sup> *Jaloud v. The Netherlands*, 47708/08 ECHR 2014, 152.

<sup>157</sup> *Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979, United Nations Doc. CCPR/C/OP/1 at 88 (1984), para. 12.3, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhstmoulju%2F14z6o8I4G3YTJPEWwn8YVWemGB1Yg6H10VolN4JFMolbM0qwmERWCaL7gK0Zeb8gxa9DtSnEIU10ZINENxVvDOnxPArV9SaZz2Ahxl4rqtA0vXdKvzI%2BAmcw%3D%eD>

<sup>158</sup> David Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?” *European Journal of International Law*, Vol. 16, No. 2 (2005), 184, <http://ejil.org/pdfs/16/2/292.pdf>

<sup>159</sup> *Al-Saadoon & Ors v. Secretary of State for Defense*, (Admin.) 715 EWHC 2015, 95.

<sup>160</sup> Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford: Oxford University Press, 2010), 223.

<sup>161</sup> *The Legality of Armed Drone Strikes under International Law: Background Paper by the International Bar Association’s Human Rights Institute*, 36.

<sup>162</sup> *Bankovic v. Belgium*, 52207/99 ECHR 2001, 69.

jurisdictions. The United States arguably has jurisdiction over, at least, some of the individuals targeted in its drone strike operations. As such, it would be legally required to respect the right of those persons to certain protections.

#### (A) *Right to Life*

The right to life is at the core of IHRL protections. It appears in numerous international instruments, including in Article 3 of the Universal Declaration of Human Rights<sup>163</sup> and Article 2 of the European Convention on Human Rights, and is recognized as a norm of customary international law.<sup>164</sup> Article 6(1) of ICCPR, to which the United States is a state party, codifies the principle, stating “[e]very human being has the inherent right to life” and “[n]o one shall be arbitrarily deprived of his life.” The ICJ has expressly stated that “the right not arbitrarily to be deprived of one’s life applies in hostilities.”<sup>165</sup> It has also been expansively interpreted by the OHCHR Human Rights Committee. In its most recent 2018 comment on Article 6, the Committee states that “[d]eprivation of life is, as a rule, arbitrary if it is inconsistent with international law or domestic law.”<sup>166</sup> It further clarifies that Article 6 arbitrariness “is not to be fully equated with ‘against the law,’ but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”<sup>167</sup>

Still, despite the high threshold requirements for eventual uses of lethal force, the ICCPR right to life is not absolute. The Covenant does not expressly enumerate specific grounds for the permissible deprivation of life, though the Human Rights Committee summarizes the general requirements as follows:

The application of potentially lethal force... must be strictly necessary in view of the threat posed by the attacker; it must represent a method of last resort after other alternatives have been exhausted or deemed inadequate; the amount of force applied cannot exceed the amount strictly needed for responding to the threat; the force applied must be carefully directed only against the attacker; and the threat responded to must involve imminent death or serious injury.<sup>168</sup>

---

<sup>163</sup> The Universal Declaration of Human Rights is not recognized as customary international law by the United States or to provide its own force as a matter of international law. *Sosa v. Alvarez-Manchain*, 542 U.S. 692 (2004).

<sup>164</sup> *The Legality of Armed Drone Strikes under International Law: Background Paper by the International Bar Association’s Human Rights Institute*, 36.

<sup>165</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 2, para. 25.

<sup>166</sup> “General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life,” CCPR/C/GC/36, Human Rights Committee, October 30, 2018, para. 12, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23809&LangID=E>

<sup>167</sup> “General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life,” para. 12.

<sup>168</sup> “General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life,” para. 12.

In the context of law enforcement, the OHCHR has explained that potentially lethal force may be compatible with the right to life when used in “defense of others against the imminent threat of death or serious injury [or] to prevent the perpetration of a particularly serious crime involving grave threat to life.”<sup>169</sup> The ECtHR also largely adopted this position in *McCann v. United Kingdom*.<sup>170</sup>

Lack of consensus on a precise definition of imminence has rendered the legal parameters surrounding the use of lethal force under right to life jurisprudence somewhat indefinite. Even so, the requirements of proportionality and necessity still pose serious legal challenges for the United States’ targeted drone strike operations. The International Bar Association notes that the targeting of an individual “on the basis of acts previously performed, or their position in an organization” patently fails to satisfy either requirement.<sup>171</sup>

### *(B) Right Not to Be Subjected to Cruel, Inhuman or Degrading Treatment*

Article 7 of the ICCPR states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Article 1 of the CAT states that “torture means any act by which severe pain or suffering, whether mental or physical, is intentionally inflicted on a person...” Article 16 refers to “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.” This has given rise to assertions that unintentional, or negligent, acts that cause suffering, including mental suffering, might amount to cruel, inhuman or degrading treatment.<sup>172</sup> United States drone strike operations may implicate the ICCPR Article 7 and CAT Article 16 rights of those persons living in regions where strikes are conducted.

## PART III

### ASSESSMENT OF THE UNITED STATES’ LEGAL POSITION

#### *United States’ Legal Position*

#### Analytic Framework

Assessment of the United States’ legal position with respect to its targeted drone strike operations abroad requires a multipartite, contingent analysis. First, any use of drone-inflicted

---

<sup>169</sup> “Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,” adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, August 27 to September 7, 1990, para. 9, <https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx>

<sup>170</sup> *McCann & Ors v. United Kingdom*, 18984/91 ECHR 1995

<sup>171</sup> *The Legality of Armed Drone Strikes under International Law: Background Paper by the International Bar Association’s Human Rights Institute*, 37.

<sup>172</sup> *The Legality of Armed Drone Strikes under International Law: Background Paper by the International Bar Association’s Human Rights Institute*, 38, citing Manfred Nowak, “What Practices Constitute Torture? US and UN Standards,” *Human Rights Quarterly*, Vol. 28, No. 4, 2006, 809-841, 830.

force must constitute a legitimate use of force pursuant to the rules of jus ad bellum. Second, the manner in which the legitimate force is deployed must comport with relevant principles of international law. Which particular set of principles apply depends upon whether or not an armed conflict exists. If so, then the use of force must comply with principles of IHL (and possibly with those of IHRL interpreted more leniently). If not, then the use of force must comply with the more restrictive principles of IHRL. *Tableau 1* below graphically represents this analytic framework.

**Tableau 1**

STEP I	
<ul style="list-style-type: none"> <li>- <i>Is the initiation of force legitimate?</i> <ul style="list-style-type: none"> <li>o Article 2(4) general ban exceptions               <ul style="list-style-type: none"> <li>▪ Security Council authorization (Article 42)</li> <li>▪ Self-defense (Article 51)                   <ul style="list-style-type: none"> <li>• Armed attack</li> <li>• Forceful defense necessary</li> <li>• Forceful defense proportional</li> </ul> </li> </ul> </li> <li>▪ Consent</li> </ul> </li> </ul>	
STEP II	
<ul style="list-style-type: none"> <li>- <i>Is the manner of force lawful?</i> <ul style="list-style-type: none"> <li>o IHL or IHRL → depends on whether or not armed conflict exists               <ul style="list-style-type: none"> <li>▪ International armed conflict</li> <li>▪ NIAC</li> </ul> </li> </ul> </li> </ul>	
Armed Conflict	No Armed Conflict
<ul style="list-style-type: none"> <li>- IHL           <ul style="list-style-type: none"> <li>o Distinction</li> <li>o Precaution</li> <li>o Proportionality</li> <li>o Necessity</li> <li>o Humanity</li> <li>o Misc.</li> </ul> </li> <li>- IHRL           <ul style="list-style-type: none"> <li>o <i>Generally subject to more lenient interpretation</i></li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>- IHRL           <ul style="list-style-type: none"> <li>o Jurisdiction</li> <li>o Right to life</li> <li>o Right not to be subjected to cruel, inhuman or degrading treatment</li> </ul> </li> </ul>

**Sources**

A skeletal framework for the legal position of the United States can be pieced together from several key documents and a compilation of other sources, including presidential speeches and statements of officials from various administrations. This assessment draws from these sources in attempting to delineate the government’s relevant arguments under each of the analytic steps set forth in *Tableau 1* above. First, however, three pivotal documents speaking to the

United States' legal position with respect to international law are briefly introduced below. The other sources are referenced where applicable in the course of the subsequent analysis.

(A) *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa-ida or an Associated Force* (Department of Justice White Paper)

The DOJ white paper, never publicly released, was leaked in November 2011 following a speech by then-Attorney General, Eric Holder, on the legal case for killing terror suspects holding United States citizenship.<sup>173</sup> It provides “a legal framework for considering the circumstances in which the U.S. government could use lethal force in a foreign country outside the area of active hostilities against a U.S. citizen... actively engaged in planning operations to kill Americans.”<sup>174</sup> Referencing explicitly “senior operational leader[s] of al-Qa-ida or an associated force,” the white paper suggests that the killing of such persons would be legally permissible where:

- 1) An informed, high-level official of the United States government has determined that the targeted individual poses an imminent threat of violent attack against the United States;
- 2) Capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and
- 3) The operation would be conducted in a manner consistent with applicable law of war principles<sup>175</sup>

In addition to providing justifications under domestic constitutional law, it offers justificatory grounds for lethal strike operations under principles of international law.

(B) *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities* (Presidential Policy Guidance)

The *Presidential Policy Guidance* (PPG) was released by the Obama Administration in May 2013 amid growing controversy surrounding the expansion of drone operations.<sup>176</sup> It “establishes the standard operating procedures for when the United States takes direct action [including lethal strike operations]... against terrorist targets outside the United States and areas of active

---

<sup>173</sup> Attorney General Holder's speech took place amid controversy surrounding the CIA's killing of two United States citizens, Anwar al-Awlaki and his American-born son in September and October of 2011. al-Awlaki, a Yemeni-American cleric, was alleged to have been involved in the planning of terrorist operations for al-Qaida. Prior to his killing, his father, Nasser al-Awlaki, had filed a law suit to have his son removed from the CIA's kill list.

<sup>174</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” 1.

<sup>175</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” 1.

<sup>176</sup> This controversy included not only demands for greater transparency and accountability, but also concerns over drone transfers and the spread of drone capabilities among other international actors. The *United States Export Policy for Military Unmanned Aerial Systems* was developed in 2015 to address the latter.

hostilities.”<sup>177</sup> Sections 1 and 2 set forth a procedure for establishing a direct action plan and approval process for capture and long-term disposition actions. Sections 3 and 4, most pertinent to this assessment, present the “policy standard and procedure” for designating high-value terrorists (HVTs) and non-HVTs for lethal action. They establish the necessary preconditions, the interagency review process, the deputies review process, the procedures for presentation to the nominating agency principle and, ultimately, the president and annual review guidelines. Sections 5, 6, 7 and 8 deal with approval procedures, post-action reporting, congressional notification and general provisions.

### *(C) Principles, Standards & Procedures (PSP)*

In October 2017, the Trump Administration adopted its own secret set of rules, the PSP, governing the use of lethal force to replace the PPG. Though the contents of the PSP have not been released in accordance with the Administration’s policy of strict secrecy, they appear to eliminate or loosen key PPG requirements that potential targets pose an imminent threat and that there be near certainty that targets are present at the time of a strike. Additionally, they revise the PPG strike determination procedure, reducing oversight and delegating decisional authority to lower-level personnel.

### Step I

### *Jus Ad Bellum*

Step I requires determination of the legitimacy of initiating force. As noted above, this necessitates that forceful acts constitute an exception to Article 2(4). Extrapolating from the DOJ white paper to the government’s general position on the legitimacy of its use of force in counterterrorism operations, four primary arguments for the satisfaction of Step I emerge.

### *(A) Active Non-International Armed Conflict*

First, the DOJ takes the position that the United States “is currently in a non-international armed conflict with al-Qa’ida and its associated forces.”<sup>178</sup> As such, it essentially claims that jus ad bellum analysis need not be undertaken for each individual strike, as the government may legitimately pursue at-will targeting of enemy belligerent forces in the course of the NIAC which began after the September 11 attacks and the September 14 congressional AUMF. This position had previously been articulated by Harald Hongju Koh<sup>179</sup> in his March 25, 2010 keynote address before ASIL in which he stated that “the United States is in an armed conflict with al-Qaida, as well as the Taliban and associated forces, in response to the horrific September 11

---

<sup>177</sup> “U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities,” 1.

<sup>178</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” 3.

<sup>179</sup> Harald Hongju Koh served as a legal adviser to the Department of State from 2009 to 2013. He has been an influential advocate for the legality of lethal strike operations in counterterrorism efforts abroad.

attacks, and may use force [against them].”<sup>180</sup> Subsequent to the white paper’s leak, Attorney General Holder expressed support for the enduring NIAC argument,<sup>181</sup> as did President Obama in his noteworthy May 23, 2013 speech at National Defense University, stating “under domestic law, and international law, the United States is at war with al-Qaida, the Taliban and their associated forces.”<sup>182</sup>

### *(B) Self-Defense*

The next justificatory position lies in the “inherent right to national self-defense recognized in [Article 51 of the United Nations Charter].”<sup>183</sup> The position is taken that operations, including lethal strikes, “conducted in a foreign country against a senior operational leader of al-Qa’ida or its associated forces who pose an imminent threat of violent attack against the United States” are “justified as an act of national self-defense,” irrespective of the existence of an NIAC.<sup>184</sup> This connotes an embrace of anticipatory self-defense, bypassing a key element of Article 51 that the state invoking self-defense first suffer an armed attack. The 2002 National Security Strategy “adapt[s] the concept of imminent threat,” upon which anticipatory action is premised, to include potential threats where “uncertainty remains as to the time and place of the enemy’s attack.”<sup>185</sup>

In the 2011 white paper, the DOJ states that an “imminent threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.”<sup>186</sup> It reasons that a “terrorist war... is a drawn out, patient, sporadic pattern of attacks” and that imminence “must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans.”<sup>187</sup> It notes further that when an al-Qaida member

has recently been involved in activities posing an imminent threat of violent attack against the United States, and there is no evidence suggesting that he has

---

<sup>180</sup> Harald Hongju Koh, “The Obama Administration and International Law,” (Keynote Address, Washington, D.C., March 25, 2010), American Society of International Law, <https://www.state.gov/documents/organization/179305.pdf>

<sup>181</sup> “Remarks As Prepared for Delivery by Attorney General Eric Holder at Northwestern University School of Law,” (Speech, Chicago, March 5, 2012), <https://www.lawfareblog.com/text-attorney-generals-national-security-speech>

<sup>182</sup> Barack Obama, “The Future of our Fight Against Terrorism,” (Speech, Washington, D.C., May 23, 2013), National Defense University, <https://www.lawfareblog.com/text-presidents-speech-afternoon>

<sup>183</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” 2.

<sup>184</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” 3.

<sup>185</sup> The White House. *National Security Strategy of the United States of America* (Washington D.C.: The White House, 2002), 15, <https://librarybestbets.fairfield.edu/citationguides/chicagonotes-bibliography#GovernmentalandOrganizationalReports>

<sup>186</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” 7.

<sup>187</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” 7.

renounced or abandoned such activities, that member's involvement in al Qa'ida's continuing terrorist campaign against the United States would support the conclusion that the member poses an imminent threat.<sup>188</sup>

Consequently, the Department assumes the position that the use of force may legitimately be taken pursuant to Article 51.

### *(C) Consent*

The DOJ makes clear in the white paper that a lethal strike operation "would be consistent with international legal principles of sovereignty and neutrality if it were conducted, for example, with the consent of the host nation's government..."<sup>189</sup> The white paper offers no insight as to the Department's understanding of the requirements inherent in the provision of valid consent.

### *(D) Unwilling-Unable*

The white paper further states that lethal strike operations would comport with principles of international law "after a determination that the host nation is unable or unwilling to suppress the threat posed by the individual target."<sup>190</sup> The address of former legal advisor to the Department of State, John R. Stevenson, before the Hammarskjold Forum of the New York Bar Association is referenced for the proposition that if a neutral state for any reason is unable to prevent violations of its neutrality by troops of a belligerent force, the other belligerent has historically been justified in attacking those troops within the neutral state.<sup>191</sup> President Obama also referenced the proposition in his National Defense University speech, implying forceful action may be taken "[w]here foreign governments cannot or will not effectively stop terrorism in their territory..."<sup>192</sup>

Additionally, Sections 3.B, addressing the policy and procedure for designating identified HVTs for lethal action, and 4.B, relating to the same procedures for non-HVTs, of the PPG specify that "an assessment that the relevant governmental authorities in the country where [lethal] action is contemplated cannot or will not effectively address the threat to U.S. persons" should precede forceful action in that state.<sup>193</sup>

---

<sup>188</sup> "Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force," 8.

<sup>189</sup> "Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force," 5.

<sup>190</sup> "Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force," 5.

<sup>191</sup> John R. Stevenson, "United States Military Action in Cambodia: Questions of International Law," Address before the Hammarskjold Forum of the Association of the Bar of New York, May 28, 1970, in Richard A. Falk, *The Vietnam War and International Law: The Widening Context*, Vol. 3 (Princeton: Princeton University Press, 1972).

<sup>192</sup> Obama, "The Future of our Fight Against Terrorism."

<sup>193</sup> "U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities," 11, 15-16.

## Step II

### **Armed Conflict Determination**

The first sub-step under Step II is the determination of whether or not the use of force occurs in the course of an armed conflict—be it international or non-international in nature. The DOJ maintains that the United States “is currently in a non-international armed conflict with al-Qa’ida and its associated forces.”<sup>194</sup> It cites the United States Supreme Court decision in *Hamdan v. Rumsfeld* as authority for this position, in which the Court found that a conflict between a state and a transnational actor constitutes an armed conflict “not of an international character.”<sup>195</sup> On this basis, it claims that “[a]ny U.S. operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities.”<sup>196</sup> Acknowledging that this understanding appears more expansive than the ICTY’s definition set forth in *Tadic*, the Department notes that it “has not found any authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location cannot be part of the original armed conflict...” and that such an understanding “does not appear to be the rule of the historical practice.”<sup>197</sup> It cites a 2008 article by Geoffrey Corn and Eric Talbot Jensen suggesting that a “myopic focus on the geographic nature of an armed conflict in the context of transnational counterterrorist combat operations” frustrates “the ultimate purpose of the drafters of the Geneva Conventions... to prevent ‘law avoidance...’”<sup>198</sup>

### **International Humanitarian Law**

If the United States is indeed engaged in an NIAC with al-Qa’ida and its associated forces, then IHL principles would apply to its uses of drone-delivered force. The DOJ explicitly acknowledges this in the white paper, stating “any such use of lethal force would comply with the four fundamental law-of-war principles governing the use of force: necessity, distinction, proportionality and humanity.”<sup>199</sup>

---

<sup>194</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” 3.

<sup>195</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-31.

<sup>196</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” 3.

<sup>197</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” 4. Here, the reference to John R. Stevenson’s address before the Hammaraskjold Forum is offered to support historical justification for the contention that an NIAC can exist in areas outside the active zone of hostilities.

<sup>198</sup> Geoffrey S. Corn and Eric Talbot Jensen, “Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror,” *Temple Law Review*, Vol. 81 (2008), 787-831, 799, [www.templelawreview.org/article/81-3\\_corn-jensen/](http://www.templelawreview.org/article/81-3_corn-jensen/)

<sup>199</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” 8.

### (A) Necessity

With respect to necessity, the PPG makes clear that persons posing a “continuing, imminent threat” might be designated for lethal action. Section 3.B(f) and Section 4.B(f) state that there must be “an assessment that no other reasonable alternatives to lethal action exist to effectively address the threat to U.S. persons.”<sup>200</sup> Section 3.D.3(2) further emphasizes that determinations on lethal action designations should consider “[w]hether the threat posed by the individual to U.S. persons can be minimized through a response short of lethal action.”<sup>201</sup> Both the PPG and the DOJ white paper express a preference for capture, with the former stating that “the United States prioritizes, as a matter of policy, the capture of terrorist suspects as a preferred option over lethal action and will therefore require a feasibility assessment of capture options as a component of any proposal for lethal action.”<sup>202</sup> The capture feasibility assessment also appears in Section 3.B(d)<sup>203</sup> with the following footnote:

This process [of designating HVTs for lethal action] is designed to review nominations of individuals only where the capture of any individual at issue is not feasible. If, at any point during or after the approval process capture appears feasible, a capture option in accordance with Section 2 [setting for nomination procedures] of this PPG... should be pursued. If the individual has already been approved for lethal action when a capture option becomes feasible, the individual should be referred to the [National Security Staff] Senior Director for Counterterrorism and undergo an expedited Deputies review focused on identifying disposition options.<sup>204</sup>

The white paper also mandates that capture be infeasible in carrying out lethal actions and offers some insight into what is meant by “feasibility:”

[C]apture would not be feasible if it could not be physically effectuated during the relevant window of opportunity or if the relevant country were to decline to consent to a capture operation. Other factors such as undue risk to U.S. personnel

---

<sup>200</sup> “U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities,” 11, 16.

<sup>201</sup> “U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities,” 14.

<sup>202</sup> “U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities,” 1.

<sup>203</sup> Interestingly, a corresponding requirement for lethal action designation of non-HVTs in Section 4.B appears to have been redacted or omitted.

<sup>204</sup> “U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities,” 11.

conducting a potential capture operation also could be relevant. Feasibility would be a highly fact-specific and potentially time-sensitive inquiry.<sup>205</sup>

Section 3.D.3(5) of the PPG offers a further factor, namely, “[w]hether the individual, if captured, would likely result in the collection of valuable intelligence,” though this is to be considered “notwithstanding an assessment that capture is not currently feasible.”<sup>206</sup>

#### *(B) Distinction*

Sections 3.B(b) and 4.B(b) of the PPG speak to the distinction principle, stating that there must be “near certainty that non-combatants will not be injured or killed” in lethal strike operations.<sup>207</sup>

#### *(C) Proportionality*

Citing the Chairman of the Joint Chiefs of Staff Instruction 5810.01D,<sup>208</sup> the white paper states that “it would not be consistent with [principles of IHL] to continue an operation if anticipated civilian casualties would be excessive in relation to the anticipated military advantage.”<sup>209</sup>

#### *(D) Humanity*

Apart from the aforementioned statement of the need to “comply with the four fundamental law-or-war principles” and the parenthetical description of the humanity principle as “the avoidance of unnecessary suffering,”<sup>210</sup> the white paper offers no further reference to the principle.

#### *(E) Other IHL Considerations*

In addition to the “four fundamental law-of-war principles,” the white paper expressly references several additional international rules of combat. It notes the denial of quarter principle, stating that in carrying out strike operations, the United States would “be required to accept a surrender if it were feasible to do so.”<sup>211</sup> It also acknowledges the prohibitions against treachery, codified in Article 23(b) of Hague Convention IV, and perfidy, codified in Article 37 of

---

<sup>205</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” 8.

<sup>206</sup> “U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities,” 15.

<sup>207</sup> “U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities,” 11, 15.

<sup>208</sup> Chairman of the Joint Chiefs of Staff Instruction, Implementation of the DOD Law of War Program, CJCSI 5810.10D, April 30, 2010, <https://www.jcs.mil/LinkClick.aspx?fileticket=xsR7ulFH4o%3D&tabid=19767&portalid=36&mid=46626>

<sup>209</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” 8.

<sup>210</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” 8.

<sup>211</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” 9.

Additional Protocol I. All the while mindful of these and all conceivable IHL restrictions, the DOJ still resolutely maintains that “[t]hese prohibitions do not, however, categorically forbid the use of stealth or surprise, nor forbid attacks on identified soldiers or officers.”<sup>212</sup> With respect to drone strikes, it contends, citing Koh’s 2010 ASIL speech, that “there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict—such as pilotless aircraft...—so long as they are employed in conformity with applicable laws of war.”<sup>213</sup> The prefatory remarks of the PPG also expand the prevailing targeting doctrine, by adding an additional ground, namely, the exercise of national security.

### International Human Rights Law

If United States drone strikes are not part of an armed conflict, NIAC or otherwise, then the application of IHRL principles is necessary. Despite acknowledging the applicability of IHRL in the Joint Declaration for the Export and Subsequent Use of Armed or Strike-Enabled Unmanned Aerial Vehicles,<sup>214</sup> the United States has firmly maintained that “the obligations assumed by a state party to the ICCPR apply only within the territory of the state party.”<sup>215</sup> This is the position that the United States does not have jurisdiction over those subject to targeting abroad and, consequently, is not obliged to respect the rights of these persons under IHRL. In keeping with this contention and the view that it is engaged in a NIAC subject to the laws of armed conflict (e.g., IHL), the DOJ white paper omits reference to IHRL altogether. While also lacking express mention of IHRL, the Stimson Center notes in its 2018 Action Plan on U.S. Drone Policy, however, that the PPG

was, in part, designed to add additional policy constraints on lethal action and to draw the prerequisite conditions for using drones in areas outside traditional battlefields closer to the conditions required under a law enforcement paradigm – and international human rights law...<sup>216</sup>

This is arguably evident in an attempt of the PPG to minimize civilian harm. Provisions like 3.B(a) and 4.B(a), mandating the target be present with “near certainty,” and 3.B(b) and 4.B(b), mandating that non-combatants not be killed in the course of targeting operations with “near certainty,” align the government’s position more closely with the OHCHR Human Rights Committee’s interpretation of the ICCPR’s right to life principle.

---

<sup>212</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” 8.

<sup>213</sup> “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” 9.

<sup>214</sup> “Joint Declaration for the Export and Subsequent Use of Armed or Strike-Enabled Unmanned Aerial Vehicles,” Department of State, October 16, 2017, <https://www.state.gov/t/pm/rls/fs/2017/274817.htm>

<sup>215</sup> “Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant,” footnote 9, 142.

<sup>216</sup> “An Action Plan on U.S. Drone Policy: Recommendations for the Trump Administration,” Stimson Center, June 2018, 11-12, <https://www.stimson.org/file/26208>

## Trump Administration Relaxations

All the while revitalizing and expanding drone strike operations, the Trump Administration appears to have relaxed Obama-era guidelines and policy directives, obscuring the government's present legal position. According to the American Civil Liberties Union (ACLU), the Administration replaced the PPG with its own secret set of rules governing lethal drone strike procedures in October 2017.<sup>217</sup> These new rules, the PSP, appear to loosen three key PPG constraints:

1. PSP eliminates the PPG Section 3.A and 4.A requirement that potential targets pose an "imminent threat"
2. PSP reduces the "near certainty" requirement of PPG Section 3.B(a) and 4.B(a) for the presence of targeted persons to "reasonable certainty"
3. PSP revises PPG strike determination procedures, reducing senior policymaker involvement and oversight and delegating more authority to lower-level operational commanders

The elimination of an imminent threat requirement removes a fundamental prerequisite upon which PPG Sections 3 and 4 are premised and indefinitely widens the scope of possible subjects for targeting. Furthermore, downgrading of the near certainty requirement increases risk of error and civilian harm and revision of determination and oversight procedures further diminishes transparency and frustrates accountability.

In addition to these noteworthy changes, the Administration's strict policy of secrecy leaves ambiguous its definition of "areas of active hostilities." In March 2017, President Trump approved Pentagon classification of new regions in Yemen and Somalia as zones of active hostilities, expanding upon existing Obama-era designations in Afghanistan, Iraq, Syria and parts of Libya. The Stimson Center comments that "a more expansive definition or application of 'areas of active hostilities' ... could impact how and where the United States uses lethal force ... potentially widening the use of armed drones in more theaters against a greater number of groups and individuals."<sup>218</sup> The legal implications of these classification decisions are not inconsequential either in that lethal actions within active conflict zones trigger the more lenient jus in bello framework and tend to permit a more flexible construal of applicable IHRL.

## Summary of Present United States Legal Position

The DOJ white paper and PPG, products of the relative transparency of the Obama Administration, provide an outline of the United States' legal position with respect to its drone

---

<sup>217</sup> "ACLU v. DOD—FOIA Case Seeking Trump Administration's Secret Rules for Lethal Strikes Abroad," American Civil Liberties Union, Release, January 16, 2018, <https://www.aclu.org/cases/aclu-v-dod-foia-case-seeking-trump-administrations-secret-rules-lethal-strikes-abroad>. On October 30, 2017, the ACLU filed a Freedom of Information Act request seeking public disclosure of the new rules. In response to the Administration's refusal to acquiesce, the ACLU filed a lawsuit on December 21, 2017 to compel disclosure. At the time of this writing, the suit is still pending.

<sup>218</sup> "An Action Plan on U.S. Drone Policy: Recommendations for the Trump Administration," 16.

strike operations under international law. The Trump Administration’s apparent relaxations and return to a policy of Bush-era secrecy have made amorphous the government’s stance on pivotal legal issues such that its present position is largely opaque, frustrating scrutiny and accountability efforts.

**Tableau 2**

STEP I	
<ul style="list-style-type: none"> <li>- <u>Is the initiation of force legitimate?</u> <ul style="list-style-type: none"> <li>○ United States engaged in NIAC (white paper, citing <i>Hamden v. Rumsfeld</i>) <ul style="list-style-type: none"> <li>▪ Jus ad bellum analysis not necessary for each individual strike</li> <li>▪ Strikes part of armed conflict beginning with congressional AUMF of September 18, 2001</li> </ul> </li> <li>○ Self-defense (white paper, citing Article 51) <ul style="list-style-type: none"> <li>▪ Strikes “justified as act of national self-defense” irrespective of NIAC</li> <li>▪ Anticipatory attack permissible</li> <li>▪ Imminence does not require “clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future” (white paper) <ul style="list-style-type: none"> <li>▪ <b>Target need not pose imminent threat (PSP)</b></li> </ul> </li> </ul> </li> <li>○ Consent (white paper) <ul style="list-style-type: none"> <li>▪ Strikes permissible when carried out with consent of host nation</li> </ul> </li> <li>○ Unwilling-unable (white paper, citing State Department legal advisor) <ul style="list-style-type: none"> <li>▪ Strikes permissible against threats host nation unwilling or unable to suppress (white paper and PPG)</li> </ul> </li> </ul> </li> </ul>	
STEP II	
<ul style="list-style-type: none"> <li>- <u>Is the manner of force lawful?</u> <ul style="list-style-type: none"> <li>○ United States engaged in NIAC → IHL applies (white paper, citing <i>Hamden</i>) <ul style="list-style-type: none"> <li>▪ Any operation against al-Qaida or associated forces part of NIAC, “even if it were to take place away from the zone of active hostilities” (white paper)</li> <li>▪ Strict geographic view of armed conflict myopic and frustrates purpose of Geneva Conventions (white paper, citing Corn and Talbot Jensen)</li> <li>▪ <b>“Zone of active hostilities” not defined (Trump Administration)</b></li> </ul> </li> </ul> </li> </ul>	
Armed Conflict	No Armed Conflict
<p style="text-align: center;"><u>IHL</u></p> <ul style="list-style-type: none"> <li>○ Strikes must be “consistent with applicable law of war principles” (white paper)</li> </ul> <ul style="list-style-type: none"> <li>- <u>Distinction</u> <ul style="list-style-type: none"> <li>○ Must be “near certainty that non-combatants will not be injured or killed” (PPG)</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>○ Not applicable, United States engaged in NIAC (white paper)</li> </ul>

<ul style="list-style-type: none"> <li>○ <b>Only need “reasonable certainty” that target present; not “near certainty” (PSP)</b></li> <li>- <i>Necessity</i> <ul style="list-style-type: none"> <li>○ Capture not feasible (PPG, white paper)</li> <li>○ No reasonable alternatives to lethal action exist (PPG)</li> </ul> </li> <li>- <i>Proportionality</i> <ul style="list-style-type: none"> <li>○ Civilian damage not excessive to anticipated military advantage (white paper, <i>Instruction 5810.01D</i>)</li> </ul> </li> <li>- <i>Humanity</i> <ul style="list-style-type: none"> <li>○ Avoid unnecessary human suffering (white paper)</li> </ul> </li> <li>- <i>Denial of Quarter; Treachery; Perfidy</i> <ul style="list-style-type: none"> <li>○ Acknowledged (white paper)</li> </ul> </li> <li>- <i>*Additional DOJ Contentions</i> <ul style="list-style-type: none"> <li>○ Stealth attacks permissible</li> <li>○ Use of technologically advanced weapons permissible</li> </ul> </li> <li>- <i>Targeting permissible against (PPG):</i> <ul style="list-style-type: none"> <li>○ Members of belligerent party to armed conflict</li> <li>○ Individuals taking direct part in hostilities</li> <li>○ Individuals in exercise of national security</li> </ul> </li> </ul>	
---	--



<p style="text-align: center;"><u>IHRL</u></p> <ul style="list-style-type: none"> <li>- <i>Jurisdiction</i> <ul style="list-style-type: none"> <li>○ ICCPR jurisdiction confined “within the territory of the state party” (statement to OHCHR Human Rights Committee)</li> </ul> </li> <li>- <i>Right to Life</i> <ul style="list-style-type: none"> <li>○ No express reference <ul style="list-style-type: none"> <li>▪ “Near certainty” target present at time of strike (PPG)</li> <li>▪ “Near certainty” non-combatants not harmed (PPG)</li> <li>▪ <b>Only “reasonable certainty” target present necessary, not “near certainty” (PSP)</b></li> </ul> </li> </ul> </li> <li>- <i>Right Not to Be Subjected to Cruel, Inhuman or Degrading Treatment</i> <ul style="list-style-type: none"> <li>○ No express reference</li> </ul> </li> </ul>
--

## ***Critique of United States' Legal Position***

Each of the aforementioned positions of the United States government relating to the legitimacy and lawfulness of its international drone strike operations raise legal questions to some degree. Each contention is taken up individually below.

### Step 1

#### *(A) United States Engaged in NIAC*

The United States claims that it is engaged in a NIAC with al-Qaida and its associated forces and that its drone strikes against a myriad of groups spanning multiple states in the Middle East and Africa fall neatly within this armed conflict paradigm. This position has been questioned on multiple levels. Some have challenged the very existence of an armed conflict with al-Qaida and associated forces, claiming that terrorists are criminals, not combatants, appropriately countered within the framework of a criminal justice paradigm.<sup>219</sup> Some, like Mary Ellen O'Connell, cited in the white paper, have challenged the geographic scope of the armed conflict beyond the borders of Afghanistan.<sup>220</sup> Others have raised concerns about the United States' expansive understanding of "associated forces" and the apparent conflation of multiple groups under a broad single entity.<sup>221</sup>

Potential legal critiques of the United States' position must be compared against prevailing understandings of NIACs in international law. In accordance with these understandings, as expressed in relevant ICTY jurisprudence and International Law Commission reports, the United States' argument appears legally problematic. First, it is questionable, if not improbable, that al-Qaida and its "associated forces" qualify as a single "organized armed group" of the sort contemplated in the ICTY's *Prosecutor v. Tadic* definition, as they lack a centralized hierarchy and command structure. Individual groups, like al-Qaida in Pakistan or al-Shabaab in Somalia, might exhibit some of the organizational features identified by the ICTY, but do not appear to be present when these entities are considered together as a conglomerate. Furthermore, armed conflict analysis with each group on an individual basis is frustrated by the intensity requirement. Groups, such as al-Shabaab, have not, as of the time of this writing, engaged in armed attack against the United States. As such, barring some other justificatory basis, attacks against them would appear to be purely preemptive aggression.

---

<sup>219</sup> Bruce Ackermann, "This is Not A War," in *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven: Yale University, 2006), 13-38. He argues that war is a technique, not an adversary perse, and that it is a function of the relationship between the state, the market and technologies of destruction.

<sup>220</sup> Mary Ellen O'Connell, "Lawful Use of Combat Drones," statement before hearing of the House of Representatives Subcommittee on National Security and Foreign Affairs, April 28, 2010, <https://www.hsdl.org/?view&did=734208>

<sup>221</sup> *The Legality of Armed Drone Strikes under International Law: Background Paper by the International Bar Association's Human Rights Institute*, 20.

## (B) Self-Defense

Independent of the NIAC claim, the United States notes the national right to self-defense codified in Article 51 of the United Nations Charter. Though not referenced explicitly in the white paper, Security Council Resolution 1373 from September 2001 reaffirms that international terrorism constitutes a “threat to international peace and security” and the right to self-defense, while calling on states to “work together urgently to prevent and suppress terrorist acts...”<sup>222</sup> Rosa Brooks notes that the United States appears to regard this general language, together with Article 51, as “sufficient international legal basis for discrete, ongoing uses of force against suspected terrorists around the globe.”<sup>223</sup> However, multiple potential infirmities inhere in the United States’ employment of the self-defense justification.

The first is the armed attack element of Article 51, which the ICJ has interpreted as force “greater than a mere frontier incident.”<sup>224</sup> While the attacks of September 11 were undoubtedly calamitous, the question persists whether or not an armed group can commit an armed attack for purposes of Article 51 without any state connection. In *Nicaragua*, the ICJ stated

it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also as the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts on armed force against another state...<sup>225</sup>

In so doing, it seems to imply the need for a connection between the armed group committing an attack and a state. Though the nexus requirement has been disputed as referring to the imputation of state responsibility as opposed to the existence of an armed attack,<sup>226</sup> subsequent ICJ jurisprudence does not appear particularly supportive of this reading.<sup>227</sup> If, as the Court found in *Nicaragua*, there was not a sufficient connection between the United States

---

<sup>222</sup> Resolution 1373, United Nations Security Council, September 28, 2001, 1, [https://www.unodc.org/pdf/crime/terrorism/res\\_1373\\_english.pdf](https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf)

<sup>223</sup> Brooks, “Drones and the International Rule of Law,” 92.

<sup>224</sup> *Republic of Nicaragua v. United States (“Military and Paramilitary Activities in and against Nicaragua”)*, 1986 I.C.J. 14, para. 195.

<sup>225</sup> *Republic of Nicaragua v. United States (“Military and Paramilitary Activities in and against Nicaragua”)*, 1986 I.C.J. 14, para. 195.

<sup>226</sup> J.A. Green, *The International Court of Justice and Self-Defence in International Law* (Oxford: Oxford Hart Publishing, 2009), 50.

<sup>227</sup> *Advisory Opinion Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 2004 I.C.J. 139, 194; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* 2005 I.C.J. 146, 222-23.

and the Contras, then it is eminently questionable whether or not a sufficient connection exists between al-Qaida and the Taliban government of Afghanistan.<sup>228</sup>

Even if the September 11 attacks constitute an armed attack sufficient for the initial United States-NATO campaign in Afghanistan, at some point, temporal considerations must limit the ability of the state invoking self-defense to indefinitely take forceful action against the original aggressor. According to Article 51, this limitation would appear to become effective once “the Security Council has taken measures necessary to maintain international peace and security.” In keeping herewith, the legal basis for continued strikes in Afghanistan after the 2014 dissolution of the ISAF appears less sound. Additionally, strikes against other groups in other regions seem to simply disregard the armed attack element altogether.

The conception of anticipatory self-defense could possibly cure these deficiencies, though, as the International Bar Association notes, it has been rejected by multiple states, international institutions and a majority of commentators.<sup>229</sup> Still, there is some support in scholarship and state practice for the emergence of a doctrine condoning forceful action against an imminent threat that has not yet materialized.<sup>230</sup> Such a doctrine, however, does not appear so broad as to encompass the 2002 National Security Strategy’s adaptation of imminence to include threats where “uncertainty remains as to the time and place of the enemy’s attack” and the PSP’s apparent elimination of the imminence requirement altogether.

### (C) Consent

The United States cites consent of a host nation’s government as a possible legal basis for its international strike operations. It is conceivable that the governments of states in which the United States carries out drone strikes have consented to American participation in their preexisting NIACs with al-Qaida or its associated forces within their borders. This analysis presupposes the existence of NIACs within these states and satisfaction of the requirements of valid consent. Commentary to Article 20 of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts notes that “valid consent” must come from a legitimate government exercising de jure control of the state. Thus, the consent of the Somali government to United States counterterrorism operations may be legitimate, despite its lack of effective control outside of Mogadishu. The same likely holds for consent of the governments of Afghanistan and Iraq which maintain de jure dominion over their respective states. Yemen, however, poses a more problematic situation, as the Security Council-

---

<sup>228</sup> *Republic of Nicaragua v. United States* (“*Military and Paramilitary Activities in and against Nicaragua*”), 1986 I.C.J. 14, para. 109. In considering the relationship between the Contras and the United States, it found that “despite heavy subsidies and other support provided to [the Contras] by the United States, there [was] no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the Contras as acting on its behalf.”

<sup>229</sup> *The Legality of Armed Drone Strikes under International Law: Background Paper by the International Bar Association’s Human Rights Institute*, 14-15.

<sup>230</sup> Claus Kreß, “The State Conduct Element,” in *Crime of Aggression: A Commentary*, eds. Claus Kreß and Stefan Barriga (Cambridge: Cambridge University Press, 2017).

recognized government of Abdrabbuh Mansur Hadi has been driven out of the country by Houthi constituents.

The United States has repeatedly claimed to have Pakistani consent for its extensive drone operations conducted there, including that the “partnership was so extensive during the Bush Administration that the Pakistani intelligence agency selected its own targets for drone strikes” and that “under both administrations [i.e., the Obama Administration as well] the Pakistanis received briefings and videos of the strikes.”<sup>231</sup> Apart from former President, Pervez Musharraf’s, 2013 admission that United States-Pakistani military and intelligence-level discussion occurred and that “maybe two or three times” strikes were cleared,<sup>232</sup> the Pakistani government outside the military-intelligence sphere has uniformly denied authorizing American drone strikes in Pakistan. In March 2012, a committee of the Pakistani Parliament addressing the state’s relations with the United States demanded a cessation of CIA drone operations within Pakistan.<sup>233</sup> In May 2013, the Peshawar High Court found that United States drone strikes constituted a breach of the obligation to respect a state’s territorial integrity set forth in Article 2(4) of the United Nations Charter and in accordance with the United Nations Millennium Declaration and the Declaration of Principles of International Law Concerning Friendly Relations.<sup>234</sup> This leaves the assertion of Pakistani consent dubious.

#### *(D) Unwilling-Unable*

The United States asserts that it can take forceful action against a threat posed to it where the threat’s host state is unwilling or unable to suppress it. While the unwilling-unable doctrine is a recognized norm in international law, its parameters have not been well defined. Factors potentially relevant to assessment of the doctrine’s permissible use include prioritization of neutral state consent and cooperation, formal request that the neutral state address the threat prior to any use of force, nature and severity of threat within the neutral state and reasonable assessment of the neutral state’s control over the threat and its capacity to address it.<sup>235</sup> It is not clear to what extent the United States has lived up to these factors. For instance, the validity of consent of multiple states in which the United States carries out drone operations is questionable and the severity of the threat posed by such groups as al-Shabaab, who have never attacked the United States, is unclear.

## Step II

---

<sup>231</sup> Jon Boone and Peter Beaumont, “Pervez Musharraf Admits Permitting ‘A Few’ US Drone Strikes in Pakistan,” *The Guardian*, April 12, 2013, <https://www.theguardian.com/world/2013/apr/12/musharraf-admits-permitting-drone-strikes>

<sup>232</sup> Boone and Beaumont, “Pervez Musharraf Admits Permitting ‘A Few’ US Drone Strikes in Pakistan.”

<sup>233</sup> Qasim Nauman and Rebecca Conway, “Pakistan Parliament Committee Demands End to U.S. Drone Strikes,” *Reuters*, March 20, 2012, <https://www.reuters.com/article/us-pakistan-usa/pakistan-parliament-committee-demands-end-to-u-s-drone-strikes-idUSBRE82J08320120320>

<sup>234</sup> *Malik Noor Khan v. Federation of Pakistan*, Peshawar High Court, Writ Petition No. 1551-P/2012 (April 11, 2013), [https://archive.org/stream/698482-peshawar-high-court-judgment/698482-peshawar-high-court-judgment\\_djvu.txt](https://archive.org/stream/698482-peshawar-high-court-judgment/698482-peshawar-high-court-judgment_djvu.txt)

<sup>235</sup> Deeks, “‘Unwilling or Unable:’ Toward a Normative Framework for Extraterritorial Self-Defense.”

## (A) IHL

The white paper references the “four fundamental law-of-war principles,” as well as the applicability of additional IHL tenets, including denial of quarter. Drone strikes in general raise potential concerns under the latter, as they cannot accept surrender (particularly when they are not accompanied by boots on the ground in the affected region). Above and beyond this possible shortcoming, the United States expansion of the rules surrounding targeting, in addition to its use of certain types of strikes, raise further legal concerns under IHL.

With respect to targeting, the prevailing doctrine is fundamentally an amalgam of the principles of distinction, proportionality and precaution. Targeted strikes may be carried out against belligerent parties to an armed conflict or against civilians who directly participate in hostilities. International law generally supports the proposition that members of an armed group qualify as belligerent parties for the purposes of targeting,<sup>236</sup> while civilians not affiliated with an armed group lose their protected status “for such time as they take a direct part in hostilities.”<sup>237</sup> The prefatory remarks prior to Section 1 of the PPG note the targetability of persons falling within these two categories. However, a third category is also presented, namely, individuals “who [are] targetable in the exercise of national self-defense.” This appears to be a conflation of the *jus ad bellum* justification of self-defense with permissible targeting categories in IHL, and, thus, a novel blending of two separate and distinct legal corpora. The International Bar Association concludes that “any drone strikes carried out under [the national-self-defense] category, which violates the traditional IHL categories of targetable individuals, will be unlawful.”<sup>238</sup>

Each individual strike must distinguish between members of the permissible targeting categories and all other persons and be necessary and not cause damage excessive to the expected military advantage gained. Accordingly, collateral civilian damage is not strictly forbidden, so long as it is proportionate to military ends. While some strikes may comport with these requirements, others seemingly do not. Double-tap strikes are strikes in which a second strike follows in relatively close temporal proximity to the first to ensure that intended targets are killed. The Bureau of Investigative Journalism has confirmed the CIA’s use of such strikes in Pakistan, which have killed “dozens” of civilians and rescuers attending to victims of initial strikes.<sup>239</sup> Double-tap strikes appear to be a violation of the principle of distinction.

## (B) IHRL

---

<sup>236</sup> *Prosecutor v. Stanislav Galic*, IT-98-29-T (2003), 47; *Prosecutor v. Blaskic*, IT-95-14-A (2004), 114.

<sup>237</sup> Additional Protocol II, Article 13(3)

<sup>238</sup> *The Legality of Armed Drone Strikes under International Law: Background Paper by the International Bar Association’s Human Rights Institute*, 33.

<sup>239</sup> Chris Woods and Christina Lamb, “CIA Tactics in Pakistan Include Targeting Rescuers and Funerals,” Bureau of Investigative Journalism, February 4, 2012, <https://www.thebureauinvestigates.com/stories/2012-02-04/cia-tactics-in-pakistan-include-targeting-rescuers-and-funerals>

The ICJ has affirmed the position that IHRL principles can be applicable in cases of armed conflict in conjunction with IHL.<sup>240</sup> This leaves the question of jurisdiction, where the United States' view seems to differ from international jurisprudential trends and OHCHR Human Rights Committee suggestions. It maintains that its jurisdiction only extends to those persons within its territory and subject to its jurisdiction. This restrictive conception is contradicted by the ICJ's opinion that international human rights instruments are applicable "in respect of acts done by a state in the exercise of its jurisdiction outside its own territory."<sup>241</sup> The United States also seems to disregard the widely-acknowledged geographic and personal control bases for extraterritorial jurisdiction. The Human Rights Committee has proposed that, with respect to the ICCPR, the latter basis includes "anybody directly affected by a state party's actions."<sup>242</sup> International legal consensus, as exemplified by such decisions as *Al-Saadoon*, is arguably moving in a direction more closely aligned with the Committee's jurisdictional expansion. Furthermore, the ECtHR has found that IHRL principles apply to the actions of a state carried out in another state "through the consent, invitation or acquiescence of the government" of the other state.<sup>243</sup> This would, at a minimum, subject the United States to IHRL obligations in those countries in which it claims host state consent for its drone strikes.

Substantively, United States strikes raise concerns under the right to life principle codified in Article 6(1) of the ICCPR. Though the use of lethal force is not strictly prohibited, the Human Rights Committee has provided that

[t]he application of potentially lethal force... must be strictly necessary in view of the threat posed by the attacker; it must represent a method of last resort after other alternatives have been exhausted or deemed inadequate; the amount of force applied cannot exceed the amount strictly needed for responding to the threat; the force applied must be carefully directed only against the attacker; and the threat responded to must involve imminent death or serious injury.<sup>244</sup>

Despite a lack of consensus on the precise definition of imminence in the right to life context, the PSP's elimination of an imminent threat requirement altogether would appear problematic. Outside the case of an armed conflict, United States drone strikes would likely suffer serious infirmity under the necessity and proportionality requirements as well. The International Bar Association comments that targeting individuals on the lone basis of affiliation with previously

---

<sup>240</sup> *Advisory Opinion Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 2004 I.C.J. 139, para. 106.

<sup>241</sup> *Advisory Opinion Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 2004 I.C.J. 139, para. 107.

<sup>242</sup> Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense," 184.

<sup>243</sup> *Bankovic v. Belgium*, 52207/99 ECHR 2001, 69.

<sup>244</sup> "General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life," para. 12.

committed acts or position within a given organization, absent an imminent threat, would fail both strictures.<sup>245</sup>

Additionally, it is conceivable that Article 1 of the CAT, which includes physical and mental suffering, could be so construed as to capture the deleterious psychological impacts on those living in the immediate vicinity of drone targeting zones.

Summary

As the foregoing explains, the United States’ primary legal justifications for its international drone strike operations are susceptible to critique on multiple grounds. Tableau 3 below graphically represents these critiques and color-grades them according to gravity. Red represents a contradiction of international law as interpreted by international judicial bodies, clear violations (e.g., doing X when the law unequivocally says X is prohibited) or elimination of legal elements of given principles; yellow indicates an expansion above and beyond general conceptions of given principles; and pink connotes uncertainty as to the legality of United States actions.

*Tableau 3*

<b><u>LEGAL ARGUMENT</u></b>	<b><u>CRITIQUE</u></b>
<b>Strikes part of single, ongoing NIAC</b>	Al-Qaida and associated forces not single “organized armed group”
	Individual groups fail intensity requirement
<b>Strikes in self-defense</b>	No qualifying armed attack (nexus requirement)
	Response indefinite
	Amelioration/elimination of imminent threat requirement problematic for anticipatory self-defense
<b>Strikes in accord with host state consent</b>	Hadi government in Yemen lacks effective control for consent purposes
	Pakistani government overtly denies consent
<b>Strikes in accordance with unwilling-unable doctrine</b>	Not clear United States has lived up to relevant factors

*Tableau 4* portrays the critiques of United States drone strike operations under IHL and IHRL.

*Tableau 4*

<b><u>LEGAL CORPUS</u></b>	<b><u>CRITIQUE</u></b>
<b>IHL</b>	National self-defense basis expands targeting doctrine
	Double-tap strikes violate distinction principle
	Strikes raise potential denial of quarter issues

<sup>245</sup> *The Legality of Armed Drone Strikes under International Law: Background Paper by the International Bar Association’s Human Rights Institute*, 37.

<b>IHRL</b>	Jurisdictional claim overly restrictive
	Imminence problem under right to life
	Necessity/proportionality problems under right to life
	Potential CAT, Art. 1 issue under right not to be subjected to cruel, inhuman or degrading treatment

### ***Assessment of United States' Position***

The position of the United States vis-à-vis its international drone operations may be construed as furthering national interests and even tenuously as comporting with domestic law. Such a generous construal, however, is more difficult in the context of international law. The United States legal position stretches, conflates and, in some instances, contradicts commonly understood principles of jus ad bellum, IHL and IHRL in unilateral fashion. The United States primarily justifies its use of lethal drone targeting through recourse to an armed conflict paradigm. Accordingly, it suggests its drone strikes in multiple Middle Eastern and African countries are permissible acts within an ongoing NIAC with al-Qaida and its associated forces. This interpretation, however, eschews prevailing NIAC analysis surrounding organization and intensity. Additionally, it claims its drone strikes are acts of self-defense, though, largely bypasses Article 51's armed attack requirement and eliminates the need for an imminent threat in the employment of anticipatory force. It invokes host state consent and the unwilling-unable doctrine, but ignores such facts as Pakistan's overt condemnation of strikes within its borders.

In assessing these deviations in totality, the United States appears to be stretching international legal frameworks to accommodate actions for which they were not originally conceived and in a manner which may well have a larger destabilizing influence on the international rule of law. Lacking a superordinate judiciary with enforcement capacity, the force and balance of international law is maintained through shared state consensus on the general meaning of legal dictates and consistent willingness to abide by them. When states understand the rules and commit to following them, positive-sum benefits of rule of law are realizable. State behavior can be generally predictable, reducing arbitrariness and promoting transparency and stability. Clarity of meaning also permits ready identification of violations, which enhances the operation of non-judicial accountability mechanisms, such as collective sanction regimes or reputational costs.

Some degree of ambiguity, as well as some margin of wiggle room for permissible non-compliance, is often necessary in achieving wide-spread state support for and adherence to a given international legal regime. The balance, however, becomes frustrated when a state within the system adopts an understanding of the legal guidelines differing substantially from that of the other states. The systemic tumult is all the more pronounced when the deviant state is a superpower, by and large immune to the immediate consequences that might otherwise impact the nonconforming behavior of less powerful states. In this case, nonconformity leads to a reduction in the predictability of the powerful state's actions. The

remaining states are left in a state of uncertainty, wavering between the status quo and some amorphous limbo – a condition complicated by the fact that the now unpredictable superpower is likely to also be a primary enforcer of the now ambiguous legal order.

The United States' expansion of international legal principles to cover its targeted strike operations arguably represents a finite realization of this abstract scenario. Its position defies straightforward legal categorization, conflating jus ad bellum and IHL in justifying targeting, lumping actions in different countries against different groups under a single NIAC without consideration of heretofore prevailing armed conflict analysis, removing imminent threat as a threshold requirement for the already questionable practice of preemptively using force in the name of self-defense, flouting the principle of distinction in the case of double-tap strikes and utilizing an intelligence agency to carry out overtly military actions, like air strikes. Adoption of this novel position is not without impact as other states, allies and enemies alike, respond to the uncertainty surrounding a burgeoning era of weaponized drone proliferation.

More than ninety state and non-state actors now boast drone capabilities with more to follow in the future. A Center for a New American Security report assessing the implications of a drone-enabled world found that the “U.S. precedent for drone use looms large in how many countries perceive drones,” suggesting some may utilize the aforementioned limbo period to take similar liberties to those taken by the United States.<sup>246</sup> This raises “awkward questions for U.S. policymakers if other countries invoke [the United States’ precedent] in defense of policies that the United States does not approve of.”<sup>247</sup> The scenario is not difficult to envision, as Russia has already made use of drones in Ukraine and, likely, Syria.<sup>248</sup> Even more troubling from a United States perspective is the eventuality in which non-state actors it deems terrorist organizations use drone technologies in the course of the United States-proclaimed armed conflict (or in self-defense against United States aggression). The fact that these actions may well comport with the United States’ expansive legal justifications for its own strikes makes condemnation problematic.

### Summary

In summation, the United States persists with its drone strike operations and maintains its exceptional legal justifications. This position stretches core international law concepts, selectively disregards others and, ultimately, erodes shared common understanding. While the United States to date remains the only large-scale user of lethal drone targeting, Russia, China, Turkey and others have seized upon the United States’ lead in the war on terror-induced period of legal laxity to take more repressive actions against their own “terrorist” concerns. This trend seems likely to continue and may well incorporate greater use of drone technologies.

---

<sup>246</sup> Kelley Sayler, Ben FitzGerald, Michael C. Horowitz and Paul Scharre, “Global Perspectives: A Drone Saturated Future,” Center for a New American Security, May 2016, [drones.cnas.org/reports/global-perspectives/](https://drones.cnas.org/reports/global-perspectives/)

<sup>247</sup> Sayler, et. al., “Global Perspectives: A Drone Saturated Future.”

<sup>248</sup> Sayler, et. al., “Global Perspectives: A Drone Saturated Future.”

## PART IV

### POSSIBLE ALTERNATIVES

Mindful of the present approach's drawbacks, the question arises whether or not any viable alternatives may exist? Can the United States protect itself from terrorist threats while limiting the negative externalities of its prevailing international counterterrorism model?

One superficially obvious option might be to constrict forceful action to comport more closely with the general understanding of relevant international law principles. This route, however, appears unsatisfactory, as it would likely require a drastic reduction in United States' counterterrorism operations and has also been argued to be overly facile. For instance, Rosa Brooks has suggested that shortcomings in the out-of-date international legal order, ill-equipped to handle contemporary threats posed by non-state actors, have induced the United States to pursue the actions it has. She notes the following:

It is easy to insist that the United States should not use force without explicit Security Council authorization, for instance, but the Security Council is paralyzed by anachronistic membership and voting rules that are themselves arguably inconsistent with rule-of-law norms. Similarly, it is easy to point out the absurdity of the U.S. definition of "imminent threat," but the United States is not wholly wrong to argue that traditional definitions of imminence are inadequate in the context of today's threats. And it is easy to lambast circular U.S. arguments about sovereignty, but here again the United States is not necessarily wrong to argue that when many lives may be at stake, sovereignty surely cannot be an absolute bar to intervention.<sup>249</sup>

Under this view, the United States' position can be seen as a kind of necessary response and, more broadly, as driving at a needed modernization of the post-World War II, state-centric legal order.

An oft-cited alternative to the use of force in general is a law enforcement-based model. Under such a schema, endorsed in Pillar II of the United Nations' Global Counter-Terrorism Strategy,<sup>250</sup> the perpetrators of international terrorist acts are considered to be criminals, not enemy combatants, and are subjected accordingly to legal sanction. To date, nineteen international legal instruments exist in the United Nations setting forth a legal framework for the criminalization of terrorist acts relating to civil aviation, maritime navigation, attacks against international staff, hostage taking, nuclear materials, explosive materials, terrorist bombings,

---

<sup>249</sup> Brooks, "Drones and the International Rule of Law," 98.

<sup>250</sup> *Global Counter Terrorism Strategy*, United Nations Office of Counter-Terrorism, <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy>

terrorist financing and nuclear terrorism.<sup>251</sup> Additionally, negotiations on the proposed Comprehensive Convention on International Terrorism have been pending in the United Nations General Assembly since 1996. It would provide, inter alia, a comprehensive definition of qualifying terrorist conduct, procedures for suspect apprehension and sanction and jurisdictional parameters.<sup>252</sup> Proponents contend that this criminal justice-based model would provide a peaceful, transparent and accountable alternative to use of force, rooted in and reinforcing of rule of law and human rights principles.

Momentum toward widespread implementation, however, has been frustrated by an inability to reach consensus on the definition of terrorism itself. Forceful arguments have also been made against this approach, citing the protracted nature of judicial proceedings, high evidentiary threshold requirements for prosecution and general foreclosure of the ability to respond immediately to time-sensitive threats and opportunities in the field.<sup>253</sup> John Bolton has also contended that reliance on an international criminal justice approach unnecessarily limits the United States' military options and is tantamount to a violation of American sovereignty, stating "[u]nder our constitution, we are fully capable of deciding how and when to use military force... we do not need international human rights experts, prosecutors or courts to satisfy our own high standards for American behavior."<sup>254</sup>

Another possible alternative, articulated in Pillar I of the United Nations' strategy, calls for the embrace of the more wholistic approach of addressing underlying conditions conducive to the spread of terrorism. It involves making

best use of the capacities of the United Nations in areas such as conflict prevention, negotiation, mediation, conciliation, judicial settlement, rule of law, peacekeeping and peacebuilding in order to contribute to the successful prevention and peaceful resolution of prolonged, unresolved conflicts.<sup>255</sup>

Such an approach of acknowledging and improving core conditions forming the genesis of terrorist activity is not without some precedent. The Good Friday Accords of 1998 provide an example of an effort toward this end in the context of the United Kingdom's protracted struggle with the Irish nationalist movement. The peace process in Colombia between the government and the Revolutionary Armed Forces of Colombia (FARC) offers another such template. Under this model, the United States might consider the grievances motivating terrorist campaigns

---

<sup>251</sup> United Nations Office of Counter-Terrorism, International Legal Instruments, [www.un.org/en/counterterrorism/legal-instruments.shtml](http://www.un.org/en/counterterrorism/legal-instruments.shtml)

<sup>252</sup> Draft Comprehensive Convention on International Terrorism, <https://www.ilsa.org/Jessup/Jessup08/basicmats/unterrorism.pdf>

<sup>253</sup> See, e.g., John Yoo, *War By Other Means: An Insider's Account of the War on Terror* (New York: Atlantic Monthly Press, 2006)

<sup>254</sup> John Bolton, "John Bolton on Law, 'International Law' and American Sovereignty," American Enterprise Institute, January 11, 2011, [www.aei.org/publication/john-bolton-on-law-international-law-and-american-sovereignty/](http://www.aei.org/publication/john-bolton-on-law-international-law-and-american-sovereignty/)

<sup>255</sup> *United Nations Global Counter-Terrorism Strategy*, Pillar I, 1.

against it and work, through negotiation and other non-conflictual means, toward minimizing them. While this framework could have the potential to bring about a longer-term solution, it would likely require the United States to rethink fundamental bulwarks of its foreign policy, such as its relations with Israel and other Middle Eastern alliances. Given the current political climate, this shift appears unlikely for the foreseeable future.

## CONCLUSION

The sunset of the Clinton presidency saw the dawn of the weaponized drone era. Since then, Hellfire missile-enabled UAVs have featured prominently in the United States' post-September 11 international counterterrorism operations. Of the three presidential administrations authorizing their use, only the Obama years afforded any meaningful effort toward enhancing transparency. The current administration has reversed course on this initiative, shrouding its targeted killing program back in Bush-era secrecy.

While the early roots of the war on terror in Afghanistan against the perpetrators of the September 11 attacks have steadily grown to produce a complex tree of counterterrorism operations spanning seventy-six countries, the United States' legal position under international law, most clearly articulated by the Obama Administration, has remained unchanged. Its architecture, based variously on exceptional interpretations of an NIAC, self-defense, consent and the unwilling-unable doctrine, stretches the fabric of post-World War II jus ad bellum, IHL and IHRL doctrines. In an age of expanding weaponized drone proliferation, the United States' expansive legal position raises rule of law concerns, potentially setting a troubling precedent for other state and non-state actors.

Alternatives to the United States' international counterterrorism model, including scaling back strike operations, implementing international criminal law-based models and addressing underlying conditions driving anti-American terrorism, exist in theory. In practice, however, each option would have consequences rendering it impracticable under present and foreseeable political conditions. It, thus, appears that the United States is locked into its current approach for the time being.



Center for Global Security Research  
Lawrence Livermore National Laboratory  
P.O. Box 808, L-189 Livermore, California 94551  
<https://CGSR.llnl.gov>

This work was performed under the auspices of the U.S. Department of Energy by Lawrence Livermore National Laboratory under Contract DE-AC52-07NA27344. LLNL-TR-800242